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FELONY MURDER AND THE EIGHTH AMENDMENT JURISPRUDENCE OF DEATH†

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I. Introduction

This article examines the tension between two antithetical criminal law doctrines: the felony murder rule of ancient, though disputed, lineage,[1] and the modern jurisprudence of capital punishment under the eighth amendment, which the Supreme Court has created over the past two decades. A tension has developed between these two doctrines because they are, fundamentally, polar opposites. On the one hand, the felony murder rule, in its starkest form, provides that any participant in a specified felony that results in a death shall be punished as a murderer, no matter how accidental or unforeseeable the death, nor how attenuated the defendant's connection to the death.[2] As such, the rule long has been criticized as a singular exception to the normal principles of criminal law, which require that liability for a particular offense be predicated

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[1] One commentator traces the origin of the felony murder rule back to Roman law. Morris, *The Felon's Responsibility for the Lethal Acts of Others*, 105 U. Pa. L. Rev. 50, 58 n. 43 (1956). More commonly, the rule is considered to have originated either in a sixteenth century homicide case or in a misinterpretation by Lord Coke of an earlier treatise on homicide. *Id.* at 58; Roth & Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 Cornell L. Rev. 446, 449 and nn. 17–20 (1985). The history of the rule in America is sketched briefly in the commentary to the Model Penal Code. Model Penal Code § 210.2 comment 6 (1980).

[2] "The classic formulation of the felony-murder doctrine declares that one is guilty of murder if a death results from conduct during the commission or attempted commission of any felony." Model Penal Code § 210.2 comment 6 (1980). The rule operates to hold the accused liable for murder if the killing is connected in any way either with the attempt to commit a felony or to flee from the scene of a felony. It does not matter whether the killing occurs accidentally or non-negligently. Fletcher, *Reflections on Felony-Murder*, 12 Sw. U.L. Rev. 413 (1981). In its most extreme forms, the rule has been extended to impose liability on felons for deaths caused by third parties, such as the intended victim, the police, or a bystander. *Id.* at 422–23; *see also infra* notes 33, 34 and 35 and accompanying text.

on the individual defendant's *mens rea* and degree of participation in the specific offense charged.[3]

On the other hand, the Supreme Court's modern jurisprudence of death is based on a heightened refinement, not an exception, to these principles. This refinement requires an even more searching inquiry into all of the relevant aspects of the crime and the defendant than usually is found in criminal law to ensure the reliability and correctness of the decision to impose death.

The purpose of this Article is not to rehash the many criticisms of the felony murder rule. Rather, this Article will focus on the difficulties engendered by the continued use of the rule, in one form or the other, in those states that impose the death penalty; on the attempts made by the Supreme Court to ameliorate the harshness of the felony murder rule as it applies to felony accomplices in capital cases; and on additional but as yet unexplored ways to analyze the norms of the eighth amendment in the felony murder context.

In Part II, the Article will identify briefly the fundamental themes of eighth amendment capital punishment jurisprudence: the underlying quest to limit the death penalty to only the most deserving offenders, and the Supreme Court's primary reliance on procedural rules to ensure reliability in the determination that death be imposed. Part III will discuss the inevitable disproportionality and racial impact arising from the decision by most states to retain

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[3] According to the usual principles of the criminal law, conduct combined with state of mind produces a measure of culpability, with lesser culpability yielding lesser liability. As Professor Hall states, the usual rule is that "[e]ach crime . . . has its distinctive *mens rea*." J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 142 (2d ed. 1960).

Professor Sayre describes the entire evolution of the common law in the criminal area as primarily a move towards a particularized *mens rea* requirement for each crime. Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 994, 1019 (1932). The Model Penal Code carries this evolution one step further by requiring a particular *mens rea* for each material element of the offense. MODEL PENAL CODE § 2.02 (1985). *See generally* Robinson and Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681 (1983). One who has no blameworthy *mens rea*, such as an accidental, non-negligent killer, is guilty of no crime at all unless the felony murder rule or its junior league variation, the misdemeanor manslaughter rule, is applied.

It takes little analysis to see why LaFave & Scott describe the felony murder rule, which allows conviction for even the highest degree of murder not on any proven culpability with respect to homicide but solely on liability for another crime, as a "striking exception" to the usual principles of criminal liability. 2 W. LAFAVE & A. SCOTT, SUBSTANTIVE CRIMINAL LAW § 6.8(b), at 159 (1986). The drafters of the Model Penal Code agree, noting that "[t]his doctrine aside, the criminal law does not predicate liability simply on conduct causing the death of another" and the "[p]rincipled argument in favor of the felony-murder doctrine is hard to find." MODEL PENAL CODE § 210.2 comment 6 (1980).

the felony murder rule in their first degree murder statutes. Part IV will examine the eighth amendment requirement that the states narrow the class of death-eligible murder defendants. It will explore the all too common use of the felony murder rule as a narrowing device and will demonstrate that the felony murder rule is particularly inadequate to fulfill this constitutionally mandated function.

Part V will analyze the eighth amendment prohibition against gross disproportionality in sentencing, capital and non-capital, and will discuss the Supreme Court's use of bright-line categorical rules of disproportionality in capital cases. Part VI will demonstrate that the Court has retreated from its efforts in the felony murder area to construct such a categorical rule, a rule based upon the *mens rea* of a felony murder accomplice. Part VI also will show that this retreat has undermined federal review and has left many, if not all, minimally culpable defendants unprotected by any categorical rule of exclusion. Finally, Part VII will discuss the necessity of developing a jurisprudence of case-specific proportionality review in felony murder capital cases in order to ensure that the dictates of the eighth amendment are met.

II. The Eighth Amendment and Capital Punishment—Rationalizing Death

It is no easy task to recount briefly the United States Supreme Court's venture into creating a new substantive and procedural jurisprudence of death. Perhaps the simplest way to understand it is to go back to the source—the 1972 decision in *Furman v. Georgia*,[4] in which a majority of Justices held that the existing systems of capital punishment were constitutionally deficient. The Supreme Court's activity in death penalty cases since *Furman* can be viewed as an attempt to create an American system of capital punishment that would provide a more rational basis for choosing those to be executed than the systems the Justices examined in *Furman*. The Justices in *Furman* were neither concerned with the individual cases

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[4] 408 U.S. 238 (1972) (per curiam). The per curiam decision held simply that the death penalty as imposed in *Furman* and its companion cases constituted cruel and unusual punishment in violation of the eighth and fourteenth amendments. *Id.* at 239–40. Although agreeing that the system of capital punishment then used by the states was unconstitutional, the five justice majority differed considerably on why this was so, as evidenced by the five separate concurring opinions. *See infra* notes 8–10 and accompanying text.

before them nor with the particular idiosyncracies of the state procedures that produced the specific death penalties. Instead, their concerns were more global, and their opinions reflected a condemnation of the nationwide system for imposing the death penalty.

The pre-*Furman* state capital sentencing statutes in the various states were markedly similar. In murder cases, the defendant was made eligible for capital punishment by the substantive law of homicide.[5] Most commonly, this eligibility meant that the jury had found the defendant guilty of first degree murder either because he or she killed with premeditation and deliberation, by operation of the felony murder rule, or, in rare cases, by use of a specified means, such as torture or poison.[6] Then, the sentencer, usually as part of

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[5] Most states followed the Pennsylvania model, which divides murder into degrees, with a conviction for first degree murder required for the imposition of a death sentence. PA. STAT. ANN. tit. 18 § 4701 (Purdon 1963). ("Whosoever is convicted of the crime of murder in the first degree is guilty of a felony and shall be sentenced to death . . . or to undergo imprisonment for life . . . ."). *See, e.g.*, ALA. CODE § 318 (1958) ("Every person who is guilty of murder in the first degree, shall, on conviction, suffer death, or imprisonment in the penitentiary of life"); CAL. PENAL CODE § 190 (West 1954) ("Every person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life . . . ."); TENN. CODE ANN. § 39–2405 (1955) (for first degree murder, punishment of death or imprisonment for life or for more than twenty years). A few states retained the common law definition of murder, without division into degrees, and provided that all murderers were eligible for the death penalty. *See, e.g.*, GA. CODE ANN. § 26–1005 (Harrison Supp. 1971) ("The punishment for persons convicted of murder shall be death, but may be confinement in the penitentiary for life . . . .").

[6] *See, e.g.*, CAL. PENAL CODE § 189 (West 1954) ("All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288, [sex crimes with children under 14] is murder of the first degree"); PA. STAT. ANN. tit. 18 § 4701 (Purdon, 1963) (first degree murder is all murder perpetrated by means of poison, lying in wait, any other kind of willful, deliberate and premeditated killing or in perpetration of, or attempting to perpetrate any arson, rape, robbery, burglary or kidnapping); TENN. CODE ANN. § 39–2402 (1955) (poison, lying in wait, willful, deliberate, malicious and premeditated or in perpetration of, or attempting to perpetrate any first degree murder, arson, rape, robbery, burglary or larceny). At least one state included some kinds of reckless homicide as first degree murder. *See* ALA. CODE § 314 (1958) ("Every homicide, perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious and premeditated killing; or committed in the perpetration of, or the attempt to perpetrate, any arson, rape, robbery, or burglary, or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed; or perpetrated by any act greatly dangerous to the lives of others, and evidencing a depraved mind regardless of human life, although without any preconceived purpose to deprive any particular person of life, is murder in the first degree . . . ."). *See also* GA. CODE ANN. § 26–1002 (Harrison 1953) ("Murder is the unlawful killing of a human being, in the peace of the state, by a person of sound memory and discretion, with malice aforethought, either express or implied.").

the same proceeding, was given unfettered discretion to impose the death penalty.[7]

The Justices in the majority in *Furman* focused on the random, arbitrary, capricious, and discriminatory application of the death penalty under these statutes. To Justice Douglas, the state systems of capital punishment produced death penalties in a manner "pregnant with discrimination" against minorities and the poor.[8] Justice White opined that he was unable to see any "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."[9] To Justice Stewart, the death penalty was so "wantonly and freakishly imposed" that receiving it was like being "struck by lightning."[10]

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[7] *See, e.g.*, ALA. CODE § 318 (1958) ("at the discretion of the jury"); CAL. PENAL CODE § 190 (West 1954) ("at the discretion of the jury . . . or, upon the plea of guilty, the court shall determine"); GA. CODE ANN. § 26–1005 (Harrison 1953) (life could be imposed if the jury trying the case so recommended, or, if founded solely on circumstantial evidence, the presiding judge could sentence to life at his discretion); PA. STAT. ANN. tit. 13 § 4701 (Purdon 1963) ("at the discretion of the jury trying the case"); TENN. CODE ANN. § 2406 (1955) (duty of jury to fix punishment which shall be death; jury may, if they are of the opinion that there are mitigating circumstances, fix punishment at life imprisonment or for some period over 20 years).

[8] *Furman*, 408 U.S. at 257 (Douglas, J., concurring). Justice Douglas found that unfettered discretion in application of the death penalty amounted to *de facto* discrimination. Such discretion allowed the penalty to be "selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position." *Id.* at 255. Justice Douglas compared the existing capital punishment procedure to ancient methods of *de jure* discrimination in punishment, believing that pre-*Furman* procedures achieved the same result "partially as a result of making the death penalty discretionary and partially as a result of the ability of the rich to purchase the services of the most respected and most resourceful legal talent in the Nation." *Id.* at 255–56.

[9] *Id.* at 313 (White, J., concurring). Justice White acknowledged that he could not prove his conclusion about the administration of the death penalty from the available data. Thus, his opinion was based "on 10 years of almost daily exposure to the facts and circumstances of hundreds and hundreds of federal and state criminal cases involving crimes for which death is the authorized penalty." *Id.* His major concern was that because the death penalty was imposed so infrequently, it could not achieve any legitimate penological purpose. *Id.*

[10] *Id.* at 309–10 (Stewart, J., concurring). Although Justice Stewart acknowledged Justice White's opinion, which focused primarily on the infrequency of the imposition of the death penalty, Justice Stewart was disturbed primarily by the lack of rational basis for determining the few who were selected to die. *Id.* This difference is reflected in the positions the two Justices took when the constitutionality of the death penalty was again before the Court in 1976. Justice White found his concerns with infrequency of imposition satisfied by either a mandatory death penalty statute or one which provided standards to guide the sentencer. Roberts v. Louisiana, 428 U.S. 325, 359–63 (1976) (White, J., dissenting from holding that mandatory death penalty statute violates the eighth amendment); Gregg v. Georgia, 428 U.S. 152, 226 (1976) (White, J., concurring in judgment that guided-discretion capital punishment statute is constitutionally acceptable). Conversely, Justice Stewart, although finding that a capital statute, which provided standards to guide the sentencer, potentially cured the prob-

The states reacted to *Furman* by passing statutes designed to meet the objections of Justices Stewart, White, and Douglas. Four years after deciding *Furman*, the Court upheld the death penalty for deliberate murder, optimistically predicting that capital punishment systems providing some guidance to the sentencer would effectively end, or at least minimize, the evils identified in *Furman*.[11] Having made this prediction, the Court, in a series of cases over the past fourteen years, has sought to guide the states in developing capital punishment systems that reduce, if not eliminate, discrimination, arbitrariness, and capriciousness in the selection of those to be executed.

At one time, it appeared that the Court was trying to achieve rationality in the process of selecting those to be spared as well as those to be executed—*Furman* seemed to demand as much.[12] The Court, however, has essentially abandoned the former effort, holding that the eighth amendment is little concerned with consistency in sparing a life.[13] The focus instead has been on the process of

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lems of arbitrariness and capriciousness under the pre-*Furman* system, was unwilling to approve a mandatory system of capital punishment, even though this undoubtedly would assure more frequent use of the death penalty. *Id.* at 206–07 (plurality opinion).

The two remaining concurring opinions were authored by Justices Brennan and Marshall, who held that the death penalty, under any and all circumstances, constituted cruel and unusual punishment and thus violated the eighth amendment. *Furman*, 408 U.S. at 305–06 (Brennan, J., concurring), 370–71 (Marshall, J., concurring). *See also infra* note 26 and accompanying text. Because no other Justices joined in their broad condemnation of capital punishment, Justices Brennan's and Marshall's opinions in *Furman* have been less important in the development of capital punishment law than those written by their concurring brethren.

[11] *Gregg*, 428 U.S. at 169–87 (plurality opinion) (holding death penalty not invariably disproportionate under the eighth amendment in a case of deliberate murder). The Court handed down decisions in five death penalty cases on July 2, 1976. After rejecting the frontal challenge to the death penalty in *Gregg*, the Court upheld capital punishment statutes in Georgia, Florida, and Texas, which provided sentencers with some degree of guidance in making the life/death decision. *See* Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976). At the same time, the Court invalidated the mandatory capital statutes of North Carolina and Louisiana. *See* Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 (1976). For detailed discussions of the 1976 cases, see Liebman and Shepard, *Guiding Capital Sentencing Discretion Beyond the "Boiler Plate": Mental Disorder As A Mitigating Factor*, 66 GEO. L.J. 757, 757–89 (1978); Murchinson, *Toward a Perspective on the Death Penalty Cases*, 27 EMORY L.J. 469, 491–508 (1978); *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 56, 63–79 (1976).

[12] The plurality opinion in *Gregg* described *Furman* as holding that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be *taken or spared*, that discretion must be suitably directed and limited." *Gregg*, 428 U.S. at 189 (emphasis added).

[13] McCleskey v. Kemp, 481 U.S. 279, 306–12 (1987) (holding that defendant has no eighth amendment claim based on juries' decisions to impose life sentence in other cases).

selecting those to be killed, with the overarching goal of ensuring that those defendants chosen for execution be in some way worse, or "materially more depraved,"[14] than those other first degree murderers not executed.

The Court has relied primarily on procedural protections to realize its eighth amendment goals. A state first must narrow the class of homicide defendants who are eligible for the death penalty to ensure that even if some "materially more depraved" murderers manage to avoid the death penalty, those chosen for this dubious honor will at least be among the worst offenders.[15]

This narrowing, however, is insufficient by itself to satisfy the eighth amendment. The Court has prohibited a mandatory death penalty for even the narrowest class of murder defendants.[16] Instead, after restricting the class of death-eligible defendants, a state must utilize additional procedures that assure "reliability in the determination that death is the appropriate punishment" in a given capital case.[17]

To meet this reliability requirement, a state must permit the sentencer to make "an *individualized* determination on the basis of the character of the individual and the circumstances of the crime."[18] The defendant is entitled to present and have the senten-

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[14] Godfrey v. Georgia, 446 U.S. 420, 433 (1980).

[15] See *infra* notes 49–64 and accompanying text for a more complete discussion of this narrowing requirement.

[16] In *Sumner v. Shuman*, the Court held that a mandatory death sentence was unconstitutional even for prisoners who kill while under sentence of life imprisonment without possibility of parole, thus answering a question reserved in earlier cases. 483 U.S. 66, 77–78 (1987). *See* Lockett v. Ohio, 438 U.S. 586, 604 n. 11 (1978) ("We express no opinion as to whether the need to deter certain kinds of homicide would justify a mandatory death sentence as, for example, when a prisoner—or escapee—under a life sentence is found guilty of murder."). *See also* Roberts (Harry) v. Louisiana, 431 U.S. 633, 638 (1977) (invalidating mandatory death penalty for intentional killing of police officer engaged in performance of lawful duties).

[17] Woodson v. North Carolina, 428 U.S. 280, 305 (1976). The *Woodson* plurality opinion of Justices Stewart, Powell, and Stevens based the reliability requirement on the premise that the death penalty is fundamentally different from a sentence of imprisonment. They reasoned that, "[b]ecause of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Id.* This need for heightened reliability has become, at least rhetorically, part of the Court's eighth amendment law. *See* Johnson v. Mississippi, 486 U.S. 578, 584 (1988) (Stevens, J.); Gardner v. Florida, 430 U.S. 349, 364 (1977) (White, J., concurring).

[18] Zant v. Stephens, 462 U.S. 862, 879 (1983) (emphasis in opinion). The requirement for an individualized consideration in every capital case first was mentioned in Justice Powell's plurality opinion in *Woodson*:

> A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense

cer fully consider all relevant evidence in mitigation of sentence.[19] The state also is allowed, but not required, to present a wide range of evidence in aggravation as long as it is relevant to the sentencing decision and promotes the reliability of that determination.[20]

In theory, both the restriction of discretion attendant upon the narrowing requirement and the increase in discretion caused by the full and unfettered consideration of mitigation serve the underlying goal of winnowing out those who do not convincingly deserve the death penalty. Some defendants avoid the sanction of death because the characteristics of their crimes or backgrounds do not provide

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> excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.

428 U.S. at 304 (plurality opinion).

[19] In *Lockett v. Ohio*, Justice Burger's plurality opinion held that the individualized consideration mandated by *Woodson* required that the sentencer "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less that death." 438 U.S. 586, 604 (1978) (emphasis in opinion). A majority of the Court adopted the *Lockett* holding in *Eddings v. Oklahoma*, which held that a sentencer must not only listen to mitigating evidence, but must consider it in determining whether death is the appropriate punishment. 455 U.S. 104, 110, 117 (1982).

Since *Lockett*, the Supreme Court consistently has prohibited the states from interfering in any way with the sentencer's consideration of relevant mitigating evidence. *See, e.g.*, Penry v. Lynaugh, 109 S. Ct. 2934, 2958 (1989) (Texas sentencing statute failed to allow sentencer to consider evidence of defendant's mental retardation); Mills v. Maryland, 486 U.S. 367, 384 (1988) (requirement for unanimous finding of mitigating circumstances found unconstitutional); Hitchcock v. Dugger, 481 U.S. 393, 399 (1987) (striking down death sentence because neither jury nor judge considered nonstatutory mitigating circumstances); Skipper v. South Carolina, 476 U.S. 1, 8–9 (1986) (invalidating death sentence because jury was not allowed to consider relevant mitigating evidence); Green v. Georgia, 442 U.S. 95, 97 (1979) (evidentiary rule precluded presentation of mitigating evidence); *cf.* Walton v. Arizona, 110 S. Ct. 3047 (1990) (permissible for state to place burden of proving mitigating circumstances on defendant); Franklin v. Lynaugh, 487 U.S. 164, 182, (1988) (mitigating evidence fully considered by jury); California v. Brown, 479 U.S. 538, 542 (1987) (holding constitutional an instruction telling jury not to base sentence on "mere sympathy").

[20] *Compare* South Carolina v. Gathers, 109 S. Ct. 2207, 2211 (1989) (forbidding prosecution use of victim impact evidence) *and* Booth v. Maryland, 482 U.S. 496, 509 (1987) (same) *and* Caldwell v. Mississippi, 472 U.S. 320, 339–40 (1985) (improper to misinform jury about availability of appellate review of decision) *with* California v. Ramos, 463 U.S. 992, 1013 (1983) (permissible to inform jury that governor can commute sentence of life without parole to imprisonment for terms of years) *and* Barclay v. Florida, 463 U.S. 939, 958 (1983) (not constitutional error for sentencer to consider relevant evidence not admissible under state law) *and* Barefoot v. Estelle, 463 U.S. 880, 905–06 (1983) (psychiatric testimony regarding defendant's future dangerousness admissible) *and* Zant v. Stephens, 462 U.S. 862, 890–91 (1983) (invalidity of aggravating circumstance found by jury harmless so long as evidence admitted in support of circumstance relevant to sentencing decision).

enough aggravation to distinguish them from all of the other murderers. Others avoid the death penalty because the unique characteristics of their crimes or backgrounds raise mitigating factors that separate them from the truly worst of the worst.

In addition to relying on procedural dictates, the Court has used sparingly the concept of disproportionality under the eighth amendment to rule out the death penalty for entire classes of offenders. Such classes include those who cause great harm but do not participate at all in the taking of human life;[21] those who kill but are below a minimum age;[22] those who become insane after trial;[23] and those who, as felony murder accomplices, lack a minimum level of culpability regarding a killing.[24] Under these holdings, a defendant can be ineligible for execution, no matter how aggravated the case, if a single factor, i.e., a requisite degree of harm or culpability, is absent.

The extended effort by the Court to rationalize the imposition of death has been criticized harshly, even from within the Court. Justice Harlan, writing in *McCautha v. California* the year before *Furman*, warned that any attempt to rationalize the imposition of capital punishment was a task "beyond human ability," and that the federal courts, therefore, should allow the states the freedom to choose how to impose this ultimate penalty.[25] Justices Marshall and Brennan have concluded that capital punishment never can be imposed in a manner consistent with the demands of the eighth amendment.[26] Other Justices have expressed doubts about the con-

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[21] Coker v. Georgia, 433 U.S. 584, 600 (1977).

[22] Thompson v. Oklahoma, 487 U.S. 815, 838 (1988) (prohibiting imposition of death penalty when defendant was under the age of 16 at the time the offense was committed). *But cf.* Stanford v. Kentucky 109 S. Ct. 2969, 2980 (1989) (capital punishment may be imposed when defendant was 16 or 17 years old at the time the offense was committed).

[23] Ford v. Wainwright, 477 U.S. 399, 417–18 (1986).

[24] Tison v. Arizona, 481 U.S. 137, 158 (1987); Enmund v. Florida, 458 U.S. 782, 800–01 (1982). *See infra* notes 128–61 and accompanying text for a more complete discussion of these cases.

[25] McGautha v. California, 402 U.S. 183, 204 (1971). In *McGautha*, the Court rejected a due process challenge to capital punishment that was virtually identical to the eighth amendment challenge accepted the following year in *Furman*. *Id.* at 196.

[26] Justices Brennan and Marshall initially set forth their opposition to the death penalty in their concurring opinions in *Furman*. 408 U.S. 238, 257, 314 (1972). Justice Brennan based his opposition to capital punishment on its inconsistency with the four principles found in the eighth amendment: that a punishment must not be so severe as to be degrading to the dignity of human beings; that a state must not arbitrarily inflict a severe punishment; that a severe punishment must not be unacceptable to contemporary society; and that it must not be excessive. He held the death penalty to be inconsistent with all four principles. *Id.* at 281–305 (Brennan, J., concurring). Justice Marshall analyzed the history of the death penalty to conclude that it no longer comports with evolving standards of decency. *Id.* at 314 - 42

stitutionality of the capital punishment systems now being used by the states but have been unwilling to conclude that the venture is hopeless.[27]

By shifting majorities, the Court has steered a path between the extremes. Keeping the goal of minimizing arbitrariness, caprice, and discrimination in front of them, the Justices have scrutinized various state procedures, approving some and disallowing others. Although rarely achieving unanimity on the result in any particular case, the Court seemingly has reached agreement on the questions to be asked in each case—questions relating to the evils identified in *Furman*, and the consequent need to limit the death penalty to the truly deserving.

III. Felony Murder in the Age of Eighth Amendment Capital Punishment Law

In its requirements for narrowing and individualization, as well as in its overall goal of restricting the reach of the death penalty to the most deserving offenders, the eighth amendment superstruc-

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(Marshall, J., concurring). Both Brennan and Marshall dissented in *Gregg*, making it clear that they believed that imposition of the death penalty was a *per se* violation of the eighth amendment. 428 U.S. 153, 230–31, 240–41 (1976). Both Justices consistently have maintained this position since *Gregg*, referring to the *Gregg* dissent in every case in which a death sentence has been affirmed or certiorari to a capital case denied. For a more complete discussion of the views held by Justices Brennan and Marshall, *see* Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 Mich. L. Rev. 1741, 1752–57, 1765–72, 1792, 1800–03 (1987).

In his analysis of the Court's eighth amendment capital jurisprudence, Professor Burt concludes that:

> [a] current Supreme Court majority clearly has resolved to abandon the enterprise of scrutinizing the administration of the death penalty. The disorder, the cacophony, in the Court's own prior deliberative process, however, makes it difficult to see whether this abandonment comes because the rationalizing enterprise has failed or because it was never seriously attempted.

Id. at 1818–19. *See also* Greenberg, *Capital Punishment as a System*, 91 Yale L.J. 908, 928 (1982) (concluding that an attempt to introduce evenhandedness into capital punishment system is doomed to failure); Weisberg, *Deregulating Death*, 1983 Sup. Ct. Rev. 305, 393–95 (criticizing death penalty decisions); Note, *McCleskey v. Kemp: The Supreme Court Pulls the Switch on Future Judicial Challenges to the Death Penalty*, 22 J. Marshall L. Rev. 215, 227–32 (1988) (same).

[27] This view seems best to describe the position of Justices Stevens and Blackmun. For instance, in *McCleskey v. Kemp*, Justices Blackmun and Stevens join Justice Brennan's dissenting opinion which argues that the race of victim disparity evident in Georgia capital sentencing violates the eighth amendment. 481 U.S. 279, 320 (1987) (Brennan, J., dissenting). They do not, however, join Brennan's standard "death is always unconstitutional" portion of this dissent. Instead, they argue, in a separate dissent, that even if the statistical evidence of racial prejudice was accepted as true, the problem could be remedied by limiting imposition of the death penalty to "certain categories of extremely serious crimes for which prosecutors consistently seek, and juries consistently impose, the death penalty without regard to the race of the victim or the race of the offender." *Id.* at 367 (Stevens, J., dissenting).

ture that the Court has constructed mirrors the development of the common law of homicide, at least in regard to non-felony murder. The early development of the concept of malice as a dividing line between manslaughter and murder, and the later division of murder into degrees were both attempts to narrow the class of homicide defendants eligible for the death penalty.[28] Similarly, the shift in the twentieth century from mandatory to discretionary death penalties reflected a consensus in favor of individualized consideration of the character of the offender and the circumstances of the offense.[29]

Furman was a declaration that these earlier efforts were insufficient to satisfy the eighth amendment. As subsequent decisions made clear, the Court would require both further narrowing and more intensely focused individualized considerations in an attempt to avoid the problems identified in *Furman*. In non-felony murder cases, this added refinement and order offers some assurance, however incomplete, that the death penalty will be reserved for the more culpable homicide defendants. This is because both the further narrowing of the class and the intense individualized scrutiny are applied to a class of offenders from which the least culpable homicide defendants already have been eliminated from eligibility for the death penalty. Both those who kill accidentally, without malice or without premeditation and deliberation, and those who do not participate in the killing sufficiently to be aiders and abettors under the usual norms of the criminal law are already ineligible for the death penalty, even before the procedures required by the Court are brought to bear. In short, non-felony murder capital defendants are afforded two levels of individualized scrutiny. The first level arises when the jury determines the defendant's culpability for first degree, or capital, murder, and the second level occurs when the

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[28] For a brief history of the development of Anglo-Saxon homicide law, see MODEL PENAL CODE § 210.2 comments 1 and 2 (1980). The development of malice and the lesser crime of manslaughter as a way to narrow the class of homicide defendants subject to the death penalty occurred early at common law. The further narrowing by dividing murder into degrees was initiated by Pennsylvania in 1794. *See id.* comment 2; Koenig, *Capital Punishment and Crimes of Murder*, 13 LOY. U. CHI. L.J. 817, 822–23 (1982); Wechsler, *A Rationale of the Law of Homicide: I*, 37 COLUM. L. REV. 701, 703 (1937).

[29] Woodson v. North Carolina, 428 U.S. 280, 292 n. 25 (1976). Tennessee became the first state to grant juries sentencing discretion in capital cases in 1838, followed by Alabama in 1841, and Louisiana in 1846. By the turn of the century, 23 states and the federal government had moved to discretionary sentencing. During the next two decades, 14 more states had replaced their mandatory death penalty statutes with discretionary statutes, and by 1963, all remaining jurisdictions still authorizing the death penalty had followed suit. *Id.*

sentencer, whether judge or jury, examines the case by using the procedures required by the eighth amendment.

A. *The Felony Murder Rule and the Quest for Appropriateness*

The felony murder rule disrupts this pattern of individualized scrutiny as well as all meaningful narrowing. In Justice O'Connor's words, felony murder is not limited to murder "as it is ordinarily envisioned."[30] In contrast to the winnowing out of the least culpable offenders through the application of the malice and premeditation/deliberation standards of non-felony murder homicide law, the felony murder rule thrusts an entire undifferentiated mass of defendants into the category of the supposedly worst murderers eligible for the death penalty. Some of these defendants indeed may be among the most culpable offenders—for example, the cold-blooded executioner of a store clerk during a robbery—but many are not. The rule makes no distinctions.

The felony murder rule disregards the normal rules of criminal culpability and provides homicide liability equally for both the deliberate rapist/killer[31] and the robber whose victim dies of a heart attack, as well as for the robber's accomplice who is absent from the scene of the crime.[32] In its traditional form, still used in some jurisdictions, the felony murder rule can make the defendant guilty of murder when an officer or victim mistakenly kills a third person[33]

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[30] Enmund v. Florida, 458 U.S. 782, 812 (1982) (O'Connor, J., dissenting).

[31] *See, e.g.*, State v. Lambright, 138 Ariz. 63, 66–67, 673 P.2d 1, 4–5 (1983) (en banc) (abduction, rape, torture, and murder of hitchhiker), *cert. denied*, 469 U.S. 892 (1984).

[32] People v. Stamp, 2 Cal. App. 3d 203, 209–11, 82 Cal. Rptr. 598, 602–03 (1969), *cert. denied*, 400 U.S. 819 (1970). Two of the defendants in *Stamp* robbed a business, while the third defendant, Billy Dean Lehman, remained in the car outside. During the robbery, the defendants forced the robbery victims to lie down on the floor and instructed them to remain there for five minutes after they departed. About 15 or 20 minutes after the robbery, one of the victims, the owner, collapsed and later died. His death was diagnosed as caused by a heart attack induced by shock from the robbery. All three defendants were found guilty of first-degree robbery and murder, and sentenced to life imprisonment. The Court of Appeals affirmed, stating that the felony-murder doctrine is "not limited to those deaths which are foreseeable" but rather "a felon is held responsible for all killings committed by him or his accomplices in the course of the felony." *Id.* at 210, 82 Cal. Rptr. at 603. *See also* State v. Edwards, 122 Ariz. 206, 216, 594 P.2d 72, 82 (1979) (death of victim from heart attack, which occurred during robbery, formed basis for felony-murder conviction despite fact that death was unintended and accidental); Durden v. State, 250 Ga. 325, 330, 297 S.E.2d 237, 242 (1982) (robbery victim died of heart attack minutes after robbery; life sentence based on felony murder conviction affirmed).

[33] *See, e.g.*, Griffith v. State, 171 So. 2d 597, 597–98 (Fla. Dist. Ct. App. 1965) (court lacked jurisdiction but said would have held that defendant was liable when robbery victim accidentally killed innocent bystander); People v. Hickman, 59 Ill. 2d 89, 95, 319 N.E.2d

or an accomplice during the felony,[34] or even when the defendant is involved in a traffic accident while fleeing the felony, resulting in death.[35] A defendant who undertakes a felony only after extracting promises from his co-felon that no one will be hurt likewise is subject to the full force of the rule when the co-felon breaks the promise.[36] In these situations, the felony murder rule has the potential to equate any participant in the felony with the cold-blooded deliberate killer, no matter how unforeseeable the death or how attenuated that defendant's participation in the felony or the events leading to death.

Therefore, notwithstanding all of the procedural requirements imposed upon the states, the possibility always exists that, with the

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511, 514 (1974) (defendant liable when police officer accidentally killed detective while in pursuit of defendant), *cert. denied*, 421 U.S. 913 (1975); People v. Podolskim, 332 Mich. 508, 518, 52 N.W.2d 201, 205 (defendant liable when police officer accidentally killed another officer in gun battle with defendants as defendants were trying to escape from bank robbery), *cert. denied*, 344 U.S. 845 (1952); Commonwealth v. Almeida, 362 Pa. 596, 634–35, 68 A.2d 595, 614 (1949) (policeman killed by either defendants or fellow policeman, court held defendants liable in either case), *cert. denied*, 339 U.S. 924 (1950); Commonwealth v. Moyer, 357 Pa. 181, 197–98, 53 A.2d 736, 745 (1947) (where victim was killed by other victim or felon and murder conviction was based on theory that felon was actual killer, court on appeal upheld conviction and indicated that it could be legitimately based on either theory). For a more detailed account of this topic, *see* Morris, *The Felon's Responsibility for the Lethal Acts of Others*, 105 U. PA. L. REV. 50 (1956).

[34] Although courts most often do not impose liability upon one co-felon for the death of another, *see* 2 W. LAFAVE & A. SCOTT, *supra* note 3, § 7.5, nn. 53–56 (1986), some courts will uphold a conviction for murder in these circumstances. In California, *People v. Washington* set the standard for the imposition of the felony murder doctrine for a co-felon's death. 62 Cal. 2d 777, 44 Cal. Rptr. 442, 402 P.2d 130 (1965). The California Supreme Court held that the defendant must have intentionally committed acts in which a high probability existed that these acts would result in death, thus manifesting a conscious disregard of human life, or malice. *Id.* at 782, 44 Cal. Rptr. at 446, 402 P.2d at 134. This holding was applied in People v. Caldwell, 36 Cal. 3d 210, 222, 203 Cal. Rptr. 433, 440, 681 P.2d 274, 281 (1984) ("[D]efendants' malicious conduct of fleeing in a dangerous high-speed chase, confronting the officers with a dangerous weapon when the chase ended and further preparing to shoot it out with the deputies was a proximate cause of Belvin's [an accomplice] death.") *See also* State v. Baker, 607 S.W.2d 153, 156 (Mo. 1980) (remanded for new trial for other reasons) (stating when accomplice was killed by intended robbery victim that "it is of no concern that the fatal shot was fired by a person acting to thwart rather than further the commission of the underlying felony unless the act of the person directly causing the death was an independent intervening cause").

[35] *See, e.g.*, State v. Hacker, 510 So. 2d 304, 306 (Fla. Dist. Ct. App. 1986) (upholding felony murder charge when defendants fleeing from robbery collided with another vehicle while driving at an excessive speed, and the driver of the other vehicle died).

[36] White v. Dugger, 483 U.S. 1045 (1987) (Brennan, J., dissenting) (defendant not aware that confederates intended to kill robbery victims from beginning, voiced opposition to killing of victims, and did not participate in killings—convicted of felony murder and sentenced to death).

felony murder rule as a basis for a capital sentence, some minimally culpable felony murder defendants, like accidental killers or attenuated accomplices to the felony, will be sentenced to die, even while many cold-blooded premeditated killers will be allowed to live. This possibility hardly reflects the proportionality—the reservation of the death penalty for the worst murderers—that underlies the Court's entire eighth amendment venture.

B. *The Racial Impact of Felony Murder*

Changing the rules for murder liability simply because of the presence of a concurrent felony also has clear racial implication in modern American society. One recent study of murder cases in Dade County, Florida vividly demonstrates this racial impact.[37] Approximately three-quarters of all the first degree murder indictments studied in Dade County involved a victim and a defendant of the same race. This result was due largely to the racial make-up for non-felony murders because only eight percent of the non-felony murders involve killers and victims of different races. In stark contrast, about forty-five percent of the felony murders involved victims and defendants of different races, and in ninety-five percent of these cases, the victim was white and the defendant black. In addition, of all black defendants indicted for murdering white

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[37] Note, *Discrimination and Arbitrariness in Capital Punishment: An Analysis of Post-*Furman *Murder Cases in Dade County, Florida, 1973–1976*, 33 STAN. L. REV. 75, 86 (1980). The authors studied 350 first degree murder indictments and trials between 1973 and 1976 in Dade County, Florida. Of these, 139 (40.1%) were indicted under the felony murder rule. Under FLA. STAT. ANN. § 782.04(1)(a) (West 1976), felony murders were defined as "the unlawful killing of a human being . . . when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any arson, involuntary sexual battery, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb . . . ."

The race of the defendant and victim breaks down into the following four offender-victim categories.

Black offenders/black victims	129 cases
White offenders/white victims	139 cases
Black offenders/white victims	73 cases
White offenders/black victims	9 cases

The number of cases of white offenders and black victims is clearly too small to analyze. Although the sample size of 73 for black offenders and white victims is relatively small, the results reached in this study tend to be supported by other examinations of homicide statistics. *See infra* notes 38–41.

victims, an astounding eighty-four percent were prosecuted under the felony murder rule.[38]

The results of this study are corroborated by other statistical studies.[39] Significantly, some studies also demonstrate that the black

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[38] Note, *supra* note 37, at 88. The authors' study reveals that although the most frequent racial combination in felony murders is black defendant/white victim (43%), the most frequent racial combination for non-felony murders is white defendant/white victim (50%). The importance of the race of the victim has been studied in other statistical works. *See infra* note 39. In the Dade County study, the percentage of white victims is much higher in felony murders (80% of all felony murders) than in non-felony murders (56% of all non-felony murders).

In comparison to the 84% (61 of 73) of all black on white first degree murder indictments being prosecuted under the felony murder rule, only 29% (78 of 268) of the intraracial indictments were prosecuted under the felony murder rule.

[39] Only a few studies actually categorize murders by whether the felony murder rule has been invoked. *See* Wolfgang, Kelly & Nolde, *Comparison of the Executed and the Commuted Among Admissions to Death Row*, 53 J. CRIM. L. & CRIMINOLOGY 301 (1962) (study of death row inmates transferred for execution in Pennsylvania from 1914–1958); Bedau, *Death Sentences in New Jersey*, 19 RUTGERS L. REV. 1 (1964) (study of all persons sentenced to death from 1907 to 1960 in New Jersey). These two studies, however, do not record the race of the victim.

Most of the more recent studies of homicide cases do record the race of the victim and defendant, but do not examine whether the conviction is based on the felony murder rule or another theory. They do, however, usually look at whether the homicide was accompanied by a contemporaneous felony, and they all have found that the commission of a contemporaneous felony has racial impact implications.

For instance, Gross's and Mauro's study of homicides reported to the FBI in eight states from 1976 to 1980 closely parallels the results of the Dade County study. Gross & Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27, 58, 131–43 (1984). Of all the homicides reported, 90% or more involved killers and victims of the same race (Georgia 92%, Florida 92%, Illinois 92%, North Carolina 92%, Mississippi 93%, Virginia 90%, Arkansas 92%, Oklahoma 91%). The percentage of non-felony related murders that were intraracial was even higher, ranging from 93% to 96%, whereas the percentage of intraracial felony related murders ranged from 68% to 80% (intraracial percentages for felony murders and non-felony murders, respectively: Arkansas 74%, 95%; Florida 74%, 95%; Georgia 68%, 96%; Illinois 79%, 95%; Mississippi 70%, 96%; North Carolina 69%, 95%; Oklahoma 80%, 93%; Virginia 68%, 93%). *Id.* And, as found in the Dade County study, the likelihood of a contemporaneous felony being found is much higher when there is a black defendant and white victim than when the defendant and victim are of the same race. *Id.*

Bowers found the same patterns in his study of criminal homicides reported between 1972 and 1977 in Florida, Georgia and Texas. W. BOWERS, LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864–1982, at 230 (1984). A higher percentage of non-felony related murders was intraracial than felony murders (Florida–95% to 76%, Georgia–94% to 73%, Texas–95% to 71%). Black defendants are much more likely to be prosecuted with contemporaneous felonies when they kill white victims in comparison to white defendants who kill white victims (Florida–60% to 17%, Georgia–52% to 18%, Texas–50% to 10%). *Id.* Of all interracial felony murders, it is almost always a black defendant and white victim (Florida–93%, Georgia–93%, Texas–85%). *Id.*

Some indication exists that the greater likelihood of a contemporaneous felony in black on white crimes may be due to decisions by the police and prosecutor to increase the

defendant who killed a white victim during a felony is the defendant most likely to receive the death penalty.[40]

Of course, one can make too much of both the potential disproportionality inherent in the felony murder rule and its racial

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aggravating circumstances when there has been a white victim. *See* Radelet & Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 LAW & SOC'Y REV. 587, 600 (1985) (study of murder indictments in 20 counties in Florida between 1973 and 1976 found that police and prosecutor were much more likely to find that a contemporaneous felony was committed with a white victim, especially in black on white crimes).

For other studies that consider the relationship between felony murders and race of the defendant and victim, *see* Paternoster & Kazyaka, *Racial Considerations in Capital Punishment: The Failure of Evenhanded Justice* in CHALLENGING CAPITAL PUNISHMENT: LEGAL AND SOCIAL SCIENCE APPROACHES 125 (1988) (in felony-type capital murder indictments in South Carolina between 1977 and 1981, the most frequent racial combination was black defendant/white victim); Baldus, Pulaski & Woodworth, *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Challenge to State Supreme Courts*, 15 STETSON L. REV. 133, 194–207 (1986) (review of various studies showed highest death penalty rates for defendants with white victims in felony circumstance murders). *See also* Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016, 1019–20 (1988) (discussion of unconscious racism and eighth amendment analysis); Note, *Felony Murder: A Tort Law Reconceptualization*, 99 HARV. L. REV. 1918, 1932 (1986) (historical, emotional, and psychological basis of the felony murder rule).

[40] A number of studies have reviewed death penalty rates in felony circumstance murders. In Bowers' study of criminal homicides in Florida, Georgia, and Texas between 1972 and 1977, black defendants who killed white victims in felony type homicides were much more likely to receive the death penalty than any other defendants. W. BOWERS, *supra* note 39, at 730.

Paternoster and Kazyaka studied the 309 homicides in South Carolina between 1977 and 1981 with the commission of a felony as the statutory aggravating circumstance. In 114 of the 302 homicides (38.7%), the prosecutor sought the death penalty. In comparison, the death penalty was sought in 55 of the 111 (49.5%) black defendant/white victim felony circumstance murders, but in only 10 of the 72 (13.9%) black defendant/black victim crimes. Paternoster & Kazyaka, *supra* note 39, at 125.

Similarly, Zeisel's study of Florida death row inmates found that 83 of 268 (31%) arrests for murder of a white victim during a felony resulted in death penalty sentencing in comparison with 1 of 110 (1%) of black victim felony-related murders. Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARV. L. REV. 456, 459 (1981). Zeisel suggests that this difference may be explained as a "tabooed border crossing" in which a black, perceived as having low status, murders a white, perceived as having higher status, thereby "invok[ing] society's most punitive and repressive responses." *Id.* at 467. This would appear to be substantiated by the findings in the study by Baldus of convicted first degree murderers in Georgia from 1974 to 1978. Baldus found that the death sentence rates are highest in armed robbery murders than all other first degree murder convictions with 67 of 146 (46%) of white victim armed robbery murders resulting in the death penalty in comparison with 113 of 606 (19%) of other homicides. Baldus, Pulaski & Woodworth, *supra* note 39, at 193, 195. Zimring's study also found that black defendants in felony-related murders with white victims are much more likely to get life or the death penalty in comparison with black defendants who kill black victims (65% v. 25%). Zimring, Eigen & O'Malley, *Punishing Homicide in Philadelphia: Perspectives on the Death Penalty*, 43 U. CHI. L. REV. 227, 232 (1976) (study of the first 204 homicides reported to Philadelphia police in 1970). According to one study, the rate of execution is also highest among black felony murders. Wolfgang, Kelly & Nolde, *supra* note 39, at 306 (at 94% execution rate, "[i]t is the Negro felony murderer more than any other type of offender who will suffer the death penalty.").

impact, primarily because cases are included in the statistics that assuredly would result in first degree murder convictions and death sentences without operation of the rule. But the rule does allow a large, racially skewed group of defendants whose culpability has not been examined individually to be convicted of first degree murder, and thus to be potentially eligible for the death penalty.

Ironically, even with the current emphasis on individual culpability and individualized consideration, the impact of the felony murder rule in capital cases has not diminished at all since the advent of the post-*Furman* systems of capital punishment. Rather, the opposite is true. Now, in many states, a defendant involved in any capacity in a first degree felony murder is in a worse position with respect to the death penalty than a defendant convicted of first degree premeditated and deliberated murder.

IV. Felony Murder as a Narrowing Device—Illusion and Reality

Before *Furman*, the sole function of the felony murder rule in capital cases, like the premeditation and deliberation formula, was to provide a basis for a first degree murder conviction. Once the jury convicted the defendant, whether the basis for conviction was the felony murder rule or a premeditated and deliberate killing was unimportant, at least formally, to the sentencer's standardless decision about whether to impose death.

A large majority of states that enacted new death penalty laws after *Furman* retained both the premeditation and deliberation formula and one form or another of the felony murder rule, as bases for a conviction of capital murder.[41] Because of the current constitutional requirement for narrowing the class of death-eligible defendants, however, no state allows the execution of a defendant convicted of murdering someone with premeditation or deliberation unless some other factor is present that makes the defendant or the crime worse in comparison to other first degree murderers or murders. This result is not necessarily true for defendants convicted under the felony murder rule. Because many states concurrently use the felony murder rule both as a basis for a capital conviction and as a device to narrow the class of death-eligible

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[41] The majority opinion in *Enmund v. Florida* stated that of the 36 state and federal jurisdictions which authorized the death penalty in 1982, only 4 completely excluded felony murder as a capital crime. 458 U.S. 782, 789 n. 6 (1982).

defendants, a defendant convicted of felony murder may be sentenced to death even in the absence of any other factors in aggravation.

A. *The Constitutional Requirement for Narrowing the Class*

The Supreme Court has required the states to narrow the sentencer's consideration of the death penalty to a smaller, more culpable class of homicide defendants than the pre-*Furman* class of death-eligible murderers as a constitutionally necessary first step[42] under the eighth amendment. A state must not only "genuinely narrow the class of [death eligible] defendants," but must do so in a way that "reasonably justifies the imposition of a more severe sentence on the defendant compared to others found guilty of murder."[43]

A properly applied narrowing device therefore provides a "principled way to distinguish [the] case, in which the death penalty was imposed, from the many cases in which it was not,"[44] and must "differentiate this [death penalty] case in an objective, evenhanded, and substantively rational way from the many . . . murder cases in which the death penalty may not be imposed."[45] Such a device theoretically supplies a rational penological basis for executing one defendant and not another, and thus gives at least some, albeit incomplete, measure of assurance that a court is applying the death penalty proportionally. Even if some defendants who fall within the restricted class of death-eligible defendants manage to avoid the death penalty, those who receive it will be among the worst murderers—those whose crimes are "particularly serious or for which the death penalty is peculiarly appropriate."[46]

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[42] Pulley v. Harris, 465 U.S. 37, 50 (1984) (describing the "constitutionally necessary narrowing function").

[43] Zant v. Stephens, 462 U.S. 862, 877 (1983). The *Zant* decision made clear that this narrowing function was the only constitutionally required role to be played by aggravating circumstances in state sentencing systems which employ aggravating circumstances. Prior to *Zant*, it was at least arguable that one constitutional role of aggravating circumstances was to provide guidance to sentencers in determining whether the murder was sufficiently aggravated to support the imposition of the death penalty. *See also* Gregg v. Georgia, 428 U.S. 153, 197–98 (1976) (aggravating circumstances guide the sentencers in their deliberations). For a thorough discussion of *Zant* and the function of aggravating circumstances, *see generally* Ledewitz, *The New Role of Statutory Aggravating Circumstances in American Death Penalty Law*, 22 DUQ. L. REV. 317 (1984).

[44] Godfrey v. Georgia, 446 U.S. 420, 433 (1980). *See also* Maynard v. Cartwright, 486 U.S. 356, 363 (1988) (quoting passage).

[45] *Zant*, 462 U.S. at 879.

[46] *Gregg*, 428 U.S. at 222 (White, J., concurring).

The critical role played by this narrowing requirement is especially significant in light of the discretion which the Court has mandated for the sentencing body, either judge or jury, in a capital case.[47] Because a capital sentencer now must be allowed wide discretion to impose a life sentence based upon any mitigating evidence concerning the character of the defendant or the circumstances of the crime—a discretion not unlike that used before *Furman*—the sentencer should be restricted to using this discretion on a class of murderers that is demonstrably smaller and more blameworthy than the class of pre-*Furman* murderers eligible for the death penalty.

States have adopted different methods to narrow the class of death-eligible defendants, but in the large majority of states, the class is narrowed by aggravating circumstances.[48] Under this approach, patterned after the Model Penal Code proposal,[49] the defendant first must be found guilty of first degree murder. The sentencer then determines the existence or non-existence of legislatively enumerated aggravating circumstances in a second proceeding.[50]

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[47] See *supra* note 19 for a discussion of relevant cases.

[48] As of 1984, 32 of the states with capital punishment statutes listed specific "aggravating factors" in their capital punishment statutes. Rosen, *The "Especially Heinous" Aggravating Circumstance In Capital Cases—The Standardless Standard*, 64 N.C.L. REV. 941, 941–92 n. 2 (1986); *see also* Special Project, *Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency*, 69 CORNELL L. REV. 1129, 1227 n. 662, 1227–32 (1984). 25 states expressly require finding at least one aggravating circumstance beyond a reasonable doubt before the death penalty can be imposed. *Id.* at 1240 n. 732.

[49] *See* MODEL PENAL CODE § 210.6 (1980). The Model Penal Code ("MPC") formulation disallows imposition of the death sentence unless the trier of fact finds one of the enumerated aggravating circumstances to exist and further finds that no mitigating circumstances sufficiently substantial to call for leniency arise. It further would preclude a sentence of death under a number of circumstances, i.e., if the defendant, with consent of the prosecuting attorney and approval of the Court, pleaded guilty to non-capital murder; was under age 18 at the time of commission of the crime; was of physical or mental condition which called for leniency; or if the evidence, while sufficient to sustain a conviction, did not foreclose all doubt respecting the defendant's guilt. The aggravating circumstances suggested by the MPC include many of the common ones since adopted by most states, including murder committed by a convict, prior convictions of murder or dangerous felony, multiple murders, knowingly creating a grave risk of danger to many persons, murder during the course of specified felonies, avoiding arrest or effecting escape, pecuniary gain, and especially heinous, atrocious or cruel aggravating circumstances. *Id. See also* Special Project, *supra* note 48.

[50] All of the states with capital punishment statutes have incorporated bifurcated proceedings. Special Project, *supra* note 48, at 1224. The commentary to the MPC's capital statute provides the rationale behind the bifurcation model:

> [S]ystems providing for jury discretion with respect to capital punishment confront an inescapable dilemma if the jury is required to impose sentence at the same time that it renders a verdict on guilt. Such information as prior criminal

States do not have to follow this exact approach. A few states have chosen instead to narrow the class of death eligible defendants by providing restrictive definitions of first degree, or capital, murder.[51] In 1988, in *Lowenfield v. Phelps*,[52] the Supreme Court approved this alternative approach, holding that no requirement existed for narrowing the class at the sentencing stage, provided that the class of death eligible defendants is, in fact, genuinely narrowed at the definitional stage.[53] A state therefore could use as an aggravating circumstance a formula that repeats the definition of first degree murder.[54]

> record or of the accused may be important to choice of punishment yet highly prejudicial to determination of guilt. Either sentencing must be based on less than all evidence relevant to the issue, or otherwise inadmissable evidence must be allowed in the trial on the ground that it contributes to an informed assessment of sentence . . . . Either choice is undesirable, and the second alternative may well be unconstitutional.

MODEL PENAL CODE § 210.6 comment 8; *cf.* McGautha v. California, 402 U.S. 183, 196 (1971) (due process clause does not require bifurcation in capital trial).

[51] The Texas statutory scheme, which the Supreme Court upheld as constitutional in Jurek v. Texas, 428 U.S. 262, 270 (1976), narrows the scope of those eligible for the death penalty at the definitional stage by narrowly defining the categories of capital murderers. The jury then makes its sentencing decision based upon its answer to three additional questions contained in the Texas capital sentencing statute. *See* TEX. PENAL CODE ANN. § 19.03 (Vernon 1989) (providing narrow definition of capital murder) and TEX. CRIM. PROC. CODE ANN. § 37.071 (Vernon Supp. 1990) (additional special issues must be answered in the affirmative to impose death penalty); *see also* OR. REV. STAT. § 163.095 (1985) (narrowing at definition of aggravated murder) and OR. REV. STAT. § 163.150 (Supp. 1990) (additional issues must be affirmatively answered to impose death); VA. CODE ANN. § 13.2–31 (1988) (narrowing occurs at definition) and VA. CODE ANN. § 19–2–264.2 (1983) (additional broad aggravating factors, one of which must be found before death imposed). For a description of the California and Louisiana schemes for narrowing the class of death eligible defendants, see *infra* note 53.

[52] 484 U.S. 231 (1988).

[53] *Id.* at 246.

[54] *Id.* The Louisiana statute limited first-degree murder at the definition stage to those with specific intent to kill or inflict great bodily harm in five enumerated circumstances. LA. REV. STAT. ANN. § 14.30 (West 1986 & Supp. 1990). Once convicted of first-degree murder, the death penalty could not be imposed unless the court found at least one aggravating circumstance from a statutory list of 10. LA. CODE CRIM. PROC. ANN. art. 905.3 (West Supp. 1990). The system resembled the Texas procedure at the definitional stage, but the more traditional Florida/Georgia procedure at the sentencing stage. *Compare* CAL. PENAL CODE §§ 190.2, 190.3 (West 1988 & Supp. 1990) (death penalty cannot be imposed unless statutory "special circumstance" found; then, aggravating factors, which include "special circumstances," are balanced against mitigating factors to determine whether death penalty is justified). The *Lowenfield* Court found that the Louisiana system was constitutional under *Jurek*. 484 U.S. 231, 244–46 (1988). As did the Texas statute in *Jurek*, the Louisiana statute genuinely narrowed the class of death-eligibles at the guilt phase. The use of the same narrowing device at the sentencing stage was therefore constitutionally irrelevant. *Id.* Only Justices Brennan and Marshall dissented on this issue, arguing that narrowing must take place at the sentencing stage of a capital trial. *Id.* at 255–58 (Marshall, J., dissenting).

States have substantial freedom to choose how they wish to restrict the class of death-eligible defendants, and considerable latitude in determining which circumstances make one murder, or one murderer, worse than another.[55] The Court has insisted, however, that the narrowing must be genuine. In two cases, *Godfrey v. Georgia*[56] and *Maynard v. Cartwright*,[57] the Court invalidated aggravating circumstances that had been applied too broadly to perform their constitutionally required function of reserving the death penalty for the most deserving defendants.[58]

B. *The Inadequacy of Felony Murder as a Narrowing Device*

Before examining the adequacy of any narrowing device to perform its constitutional function, two preliminary questions must be answered. First, what is the class that must be narrowed? Second, how is the constitutionality of a narrowing device to be judged?

The easy answer to the first question is that, at a minimum, the class that provides the starting point is the class found too broad in *Furman*—the class of defendants convicted of first degree or capital murder. In the vast majority of the cases, this class is comprised of cases decided under the felony murder rule or the premeditation and deliberation formula.[59] At a bare minimum, then, a narrowing device must identify a more restrictive and more culpable class of first degree murder defendants than the pre-*Furman* capital homicide class.

Maynard v. Cartwright provides the answer to the second question. In *Cartwright*, the Supreme Court focused solely on Oklahoma's application of the narrowing device being challenged, and not on the defendant's overall culpability, to determine whether the narrowing device was fulfilling its constitutionally mandated functions.[60] The issue in analyzing a narrowing device, therefore, is not

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[55] For a comprehensive listing of statutory aggravating circumstances, see Special Project, *supra* note 48, at 1227–32.

[56] 446 U.S. 420 (1980).

[57] 486 U.S. 356 (1988).

[58] *Cartwright* invalidated Oklahoma's application of "especially heinous, atrocious, or cruel" aggravating circumstance, finding that it had been applied so broadly as to conceivably apply to every first degree murder. *Id.* at 364. The Court in *Godfrey* held unconstitutional the Georgia Supreme Court's upholding of a finding that the defendant's conduct fit Georgia's "outrageously or wantonly vile, horrible or inhuman" aggravating circumstance. 446 U.S. at 432. For a discussion of *Godfrey* and the overall problem with the "especially heinous" aggravating circumstance, see generally, Rosen, *supra* note 48.

[59] See *supra* notes 2–3 and accompanying text.

[60] In the Court's view, the fact that the defendant in *Cartwright* had committed an especially brutal murder was simply not relevant to the infirmity caused by the Oklahoma

whether the defendant deserves the death penalty, but whether the narrowing device is both genuinely narrowing the class of death-eligible defendants and doing so in a way that identifies those defendants most deserving of death.

Cartwright addressed the quantitative requirement for narrowing devices. The Court held that the device in question was applied unconstitutionally because it included too many defendants. A narrowing device also can be inadequate constitutionally because it fails to meet the qualitative requirements under the eighth amendment; that is, because it includes defendants who are not necessarily more deserving of the death penalty and excludes those who are not necessarily less deserving. In both instances, quantitative and qualitative, the class excluded by the device must be examined together with the class included in order to make the necessary judgment. Only by comparing the two classes can one determine whether the narrowing device is genuinely identifying a sufficiently narrow class of defendants more deserving of capital punishment than other potential capital defendants.

No state has premeditation and deliberation[61] as an aggravating circumstance or other narrowing device. Such a narrowing device would not provide for any narrower and more culpable class of homicide defendants than the class that the Court examined in *Furman*. The device would describe a large part of the pre-*Furman* class but it would not really restrict that class. Although a felony murder narrowing device does no more to narrow the class than one based on premeditation and deliberation, many states that currently impose capital punishment attempt to use a version of the felony murder rule as a narrowing device.

C. *Pure Felony Murder Narrowing States*

The felony murder narrowing device appears in different guises in various states. Some states, several of which have large death row populations, are pure felony murder states; that is, they

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Court's refusal to provide an adequately narrow definition of its "especially heinous" aggravating circumstance. 486 U.S. at 365–66.

[61] Florida does have as an aggravating circumstance that the homicide was committed "in a cold, calculated, and premeditated manner without any pretense of moral or legal justification," FLA. STAT. ANN. § 921.141(5)(i) (West 1985 & Supp. 1990), but the Florida Supreme Court has attempted to construe this section narrowly so that it will not apply to every premeditated and deliberated murder. *See, e.g.*, Preston v. State, 444 So. 2d 939, 946–47 (Fla. 1984) (aggravating circumstance requires more than the premeditation required for first degree murder conviction; finding reversed); *see also* Garron v. State, 528 So. 2d 353, 360–61 (Fla. 1988) (same); Jackson v. State, 498 So. 2d 906, 910–11 (Fla. 1986) (same).

allow the defendant to be sentenced to death solely because the killing took place during an accompanying felony. A defendant first can be convicted of first-degree murder because of the rule. The rule then is used again as an aggravating circumstance, unqualified at either stage by any *mens rea* requirement.[62]

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[62] Any attempt to categorize authoritatively the states is difficult, due both to the complicated interaction between murder statutes, sentencing statutes, and case law, and to the wide variety of approaches employed by the various states. This difficulty is seen easily in the opinions in Enmund v. Florida, 458 U.S. 782 (1982). Justice White, writing for the majority, finds eight pure felony murder states which authorize the death penalty solely for participation in a robbery in which another robber takes a life. *Id.* at 789. Justice O'Connor, in dissent, adopts a different approach, and finds 20 states which permit imposition of the death penalty for a felony murderer without a showing of intent to kill. *Id.* at 820 (O'Connor, J., dissenting).

As best as can be determined, of White's group of eight 'pure' felony murder states, at least four remain in this category—Georgia, Florida, Wyoming, and South Carolina. These are states in which a defendant can be found guilty of first degree murder under a felony murder theory and in which the same underlying felony can serve as an aggravating factor to justify imposition of the death penalty, unqualified by a *mens rea* requirement. *See, e.g.*, FLA. STAT. ANN. § 782.04 (West Supp. 1990) (murder statute) and § 921.141(5)(d) (1985 & Supp. 1990) (as aggravating factor) and Melendez v. State, 498 So. 2d 1258, 1261 (1986) (upholding conviction for felony murder and felony aggravating circumstance) and Clarke v. State, 443 So. 2d 973, 977–78 (same), *cert. denied*, 467 U.S. 1210 (1983); GA. CODE ANN. § 16–5–1 (1988) (murder statute) and § 17–10–30(b)(2) (1982) (felonies as aggravating factors) and Jefferson v. State, 256 Ga. 821, 829–30, 353 S.E.2d 468, 475 (felony may be used both as aggravating circumstance and as basis for felony murder conviction), *cert. denied*, Jefferson v. Georgia, 484 U.S. 872, *reh'g denied*, 484 U.S. 971 (1987); S.C. CODE ANN. § 16–13–10 (Law. Co-op. 1988) (murder statute) and § 16–3–20(a)(1) (Law. Co-op. 1988) (as aggravating factor) and State v. Jones, 288 S.C. 1, 5, 340 S.E.2d 782, 784 (1985) (concurrent felony murder conviction and aggravating circumstance), *vacated on other grounds*, 476 U.S. 1102 (1986); WYO. STAT. § 6–2–101 (Supp. 1989) (murder statute) and § 6–2–102(h)(iv) (Supp. 1989) (as aggravating factor) and Engberg v. State, 686 P.2d 541, 556–57 (upholding dual use of felony murder), *cert. denied*, 469 U.S. 1077 (1984).

Justice White also included Tennessee, California, Mississippi, and Nevada as pure felony murder states. Tennessee remained in this category until recently. *See* TENN. CODE ANN. § 39–2–202 (1982) (murder statute) and § 39–2–203(i)(7) (1982) (as aggravating factor) and State v. Pritchett, 621 S.W.2d 127, 140–41 (1981) (upholding felony murder conviction and during course of felony aggravating circumstance). The Tennessee legislature, however, amended its capital punishment statute, effective November 1, 1989, to require recklessness during the felony before death can be imposed. TENN. CODE ANN. 39–13–202(a)(2) (Supp. 1989). Although the California statutes remain unchanged in this respect, *see* CAL. PENAL CODE § 189 (West 1988) (felony murder statute) and CAL. PENAL CODE § 190.2(a)(7) (West 1988) (felony murder special circumstance), the California Supreme Court initially read *Enmund* as requiring a finding of intent to kill before any felony murderer could be executed. Carlos v. Superior Court, 35 Cal. 3d 131, 148, 672 P.2d 862, 873, 197 Cal. Rptr. 79, 91 (1983). The court later overruled *Carlos* and held that this intent requirement did not extend to one who actually kills during the course of a felony. People v. Anderson, 43 Cal. 3d 1104, 1145, 742 P.2d 1306, 1330, 240 Cal. Rptr. 585, 609 (1987). After *Enmund*, the Mississippi legislature passed a statute requiring a finding that the defendant actually killed, attempted to kill, intended that the killing take place, or contemplated that lethal force be used. MISS. CODE ANN. § 99–19–101 (Supp. 1988); *see also* NEV. REV. STAT. § 200.033 (Supp. 1989)

As used in these states, the felony murder narrowing device fails to meet both the quantitative and the qualitative requirements for a narrowing device. It provides no meaningful narrowing and, to the extent that narrowing does exist, it does not serve to identify the defendants most deserving of death. In these states, felony murderers are treated essentially the same as they were pre-*Furman*. Just as before *Furman*, the simple fact of the accompanying felony makes the defendant death-eligible. Just as before *Furman*, the jury then can exercise its unfettered discretion to determine whether the defendant is to live or die. Lastly, just as before *Furman*, this large, unvariegated class of defendants can include all of the various accomplices and accidental killers who are swept up by the wide net of the felony murder rule.

Commentators always have criticized the felony murder rule for its bootstrapping effect. It vaults a defendant into the class of murderers without the malice finding usually required, and then, still without any culpability finding, elevates what otherwise might not even be a murder to first degree murder. In pure felony murder states, a third level of bootstrapping arises as the felony murder defendant is moved up into the supposedly restricted class of defendants eligible for death.

Felony murders have always comprised a significant proportion of all first-degree murders. One study found that felony murder indictments comprised forty percent of all first-degree murder indictments.[63] Another nation-wide study found that twenty-eight

(requiring that defendant killed, attempted to kill, or knew, or had reason to know, that life would be taken or lethal force used).

Although relatively few in number, the pure felony murder states have a large number of death sentenced inmates. As of May, 1990, there were 2,341 inmates on death row in the United States. 308 of them were in Florida, 102 in Georgia, 46 in South Carolina, 2 in Wyoming, 74 in Tennessee, 279 in California, 41 in Mississippi, and 54 in Nevada. NAACP Legal Defense and Education Fund, *Death Row USA* (May 1990).

[63] *See* Note, *supra* note 37, at 88 (finding 139 of 347 (40%) of first degree murder indictments to be felony murder indictments). The Florida statutes define felony murders as the "unlawful killing of a human being . . . when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any . . . arson, sexual battery, robbery, burglary, kidnapping, escape, aggravated child abuse, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb . . . ." FLA. STAT. ANN. § 782.04(1)(a) (West Supp. 1990). For recent cases applying the Florida felony murder rule, *see* Johnson v. State, 484 So. 2d 1347, 1349 (Fla. Dist. Ct. App. 1986) (conviction upheld where evidence showed defendant waited in car with intent to commit robbery and did not withdraw from criminal enterprise); Buford v. Wainwright, 428 So. 2d 1389, 1390 (Fla.) (first degree murder conviction upheld when unlawful homicide occurred during perpetration of sexual battery), *cert. denied*, 464 U.S. 956 (1983); Adams v. State, 341 So. 2d 765, 767–68 (Fla. 1976) (malice aforethought supplied by underlying felony in accidental killing), *cert. denied*, Adams v. Florida, 434 U.S. 878 (1977).

percent of all *homicides* were felony murders.[64] Although the Supreme Court has never clarified how much narrowing actually is required, it is certainly more than these studies illustrate. The class of felony murderers is just too large to serve as a way to limit meaningfully the reach of the death penalty.

The perverse result of the felony murder narrowing device is even more troubling. Because the usual class of first degree murderers is made up largely of two groups of defendants, felony murderers and premeditated and deliberated murderers, the only defendants who are eliminated by a felony murder narrowing device are those who kill with premeditation and deliberation, i.e., in

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[64] W. GORDON, CRIME AND CRIMINAL LAW: THE CALIFORNIA EXPERIENCE 1960–1975 13 (1981), based on FBI data of all homicides committed in the United States in 1974.

Felony murders represent an even higher proportion of the death row population. A pre-*Furman* study of Pennsylvania death row inmates found that defendants prosecuted by the felony murder rule represented 60% of those on death row. Wolfgang, Kelly & Nolde, *supra* note 39, at 304. Data were based on offenders who had been sentenced to death for first degree murder and who had been transferred to the State Institutional Correction Facility at Rockview, Pennsylvania, where executions were performed between 1914 and 1958. *Id.* at 301. The sample does not include death row inmates whose sentences were commuted or successfully appealed prior to transfer. *Id.* at 301. In Radelet's and Pierce's study of Florida counties, murders committed between 1973 and 1977 were categorized by case record descriptions. Radelet & Pierce, *supra* note 39, at 597–98. Among first-degree murder indictments, 353 of the 737 cases (48%) had a felony or possible felony and about half of these (23% of the total cases) were charged with a separate felony. *Id.* Another study found that 81% of "aggravated murders" involved a contemporaneous felony. Murphy, *Application of the Death Penalty in Cook County*, 73 ILL. B.J. 90, 91 (1984). The pool consisted of defendants found guilty of murder with one or more aggravating circumstances in Cook County, Illinois between 1977 and 1980. *Id.* Of the 438 murder indictments with one or more aggravating circumstances, 353 (81%) involved a felony-related murder; 49 (11%) murders with multiple victims and another felony; 27 (6%) multiple murders; 6 (1.4%) contract murders; 2 (.5%) murders of police officers; and 1 (.2%) contract murder with additional felony. A felony-related murder was found to be the second most frequent aggravating circumstance, following heinous, atrocious, or cruel murders, in Radelet's study of Florida death penalty cases from 1972 to 1984. Radelet, *Rejecting the Jury: The Imposition of the Death Penalty in Florida*, 18 U.C. DAVIS L. REV. 1409, 1418 (1985). Of the 326 murders, 246 (75.5%) involved at least one aggravating circumstance. *Id.* The most frequent circumstance was, "the capital felony was especially heinous, atrocious or cruel" (203 cases: 83% of cases with aggravating circumstance, 62% of all death penalty cases). This was followed by, "the capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb" (177 cases: 72% of cases with aggravating circumstance, 54% of all death penalty cases). *Id.* All other aggravating circumstances were less frequent, including prior violent felony convictions (116 cases), during lawful arrest or escape (96 cases), committed for pecuniary gain (94 cases), cold/calculated/premeditated (58 cases), defendant was prisoner (57 cases), knowingly created great risk of death to many persons (55 cases), and committed to interrupt government function/enforcement of laws (34 cases). *Id.*

cold blood, but not during the course of a felony. Of course, unless otherwise limited, the class of felony murderers includes not only cold-blooded killers but also accidental killers and attenuated accomplices. Thus, a felony murder narrowing device excludes many cold-blooded killers while simultaneously making accidental killers and attenuated accomplices death eligible—hardly the way a narrowing device is supposed to work. A simple felony murder, unaccompanied by any other aggravating factor, is not worse than a simple premeditated and deliberated murder. If anything, the latter, which by definition involves a killing in cold blood, involves more culpability. A procedure that provides death eligibility for the former solely by eliminating the possibility of execution for the latter is irrational. For example, an accomplice to a robbery in which the victim dies accidentally should not be eligible for the death penalty while a killer who acts with premeditation and deliberation is excluded from this class.

In addition, not only does the felony murder rule in these states leave a death-eligible group that is too large, and includes the least culpable and excludes many of the most culpable, but it also includes a disproportionately high number of minority defendants convicted of killing white victims. Ominously, the very size of the death eligible class provides fertile ground for the discrimination that has long plagued the administration of capital punishment in America.

D. *Reckless Felony Murder as a Narrowing Device*

A few states qualify their felony murder narrowing devices by requiring that the defendant possess a specified *mens rea* of recklessness or culpable negligence at either the guilt or sentencing stage.[65] All felony murderers potentially meet a recklessness standard; that is, one who purposely undertakes a felony that results in a death almost always can be found reckless.[66] Therefore, the narrowing devices in these states are essentially no different from those in the pure felony murder states. Further, the Supreme Court case of *Tison v. Arizona* now places a nation-wide threshold of culpability at the reckless indifference level, meaning that a defendant who acts without reckless indifference is not constitutionally eligible for

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[65] *See, e.g.*, ARK. STAT. ANN. § 5–10–101(a)(1) (Supp. 1987) (requiring indifference to human life); DEL. CODE ANN. tit. 11, § 4209(e)(1)(j) (Supp. 1988) (requiring criminal negligence).

[66] *See infra* note 151 and accompanying text.

the death penalty.[67] Because the absence of reckless indifference immunizes a defendant constitutionally, its presence can not meaningfully further narrow the class of death eligible defendants.

E. *Intentional Felony Murder as a Narrowing Device*

Some states qualify their felony murderer narrowing device with an "intent to kill" requirement.[68] At first blush, it seems that a felony murder narrowing device thus limited would meet constitutional standards. Requiring that the felon intentionally kill during the course of a felony actually does identify a class of more culpable murderers. As in those states that limit first-degree murder to non-felony murders and then have an aggravating circumstance that the murder was committed during the course of a felony,[69] an intentional felony murder narrowing device does more than identify one major component of the pre-*Furman* class of death eligible defendants. It narrows the class to the set where the two traditional categories overlap.[70]

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[67] 481 U.S. 137, 158 (1987).

[68] For states that require intent at the guilt stage, *see, e.g.*, ALA. CODE § 13A–5–40 (Supp. 1988) and ALA. CODE § 13A–6–2(a)(1) (1982) (capital murder means murder as defined in 13A–6–2(a)(1)) ("with intent to cause death of another person he causes the death of that person or of another person"); LA. REV. STAT. ANN. § 14:30(A)(1) (West Supp. 1989) ("specific intent to kill or inflict great bodily harm"); OHIO REV. CODE ANN. § 2903.01(D) (Anderson 1987) ("no person shall be convicted . . . unless he is specifically found to have intended to cause the death of another"); OR. REV. STAT. § 163.095(2)(d) (1987) ("personally and intentionally committed"); TEX. PENAL CODE ANN. § 19.03(a)(2) (Vernon 1987) ("intentionally commits the murder"); UTAH CODE ANN. § 76–5–202 (Supp. 1988) ("intentionally or knowingly"); VA. CODE ANN. § 18.2–31 (1988) ("willful, deliberate and premeditated killing"). Other states place the intent requirement in the aggravating factor. *See, e.g.*, IDAHO CODE § 19–2515(g)(7) (1987) ("with specific intent to cause death"); IND. CODE ANN. § 35–50–2–9(b)(1) (Burns Supp. 1988) ("by intentionally killing"); MISS. CODE ANN. § 99–19–107(7) (Supp. 1988) (intent required); NEV. REV. STAT. § 200.033(4)(a),(b) (1985) (felony aggravating factor requires finding that defendant "killed or attempted to kill" or "knew or had reason to know that lethal force would be used"); N.M. STAT. ANN. § 31–20A–5(B) (1987) ("with intent to kill").

[69] At least two states presently have such a system. *See* MO. ANN. STAT. § 565.020 (Vernon Supp. 1989) and MO. ANN. STAT. § 565.032(2) & (11) (Vernon Supp. 1989) (first degree murder defined as knowingly causing the death of another after deliberation; murder occurring during a felony can act as aggravating circumstances to warrant imposition of the death penalty); 18 PA. CONS. STAT. ANN. § 2502(a) (Purdon 1983) and 42 PA. CONS. STAT. ANN. § 9711(d)(6) (Purdon Supp. 1989) (first degree murder confined to intentional killings; killings committed while in perpetration of a felony is aggravating factor for imposition of death penalty).

[70] Of course, the overlap is not exact because intent to kill is not the same as premeditation and deliberation. But even before *Furman*, some courts required only malice aforethought, and not premeditation and deliberation, for death eligibility for non-felony murderers. *See supra* note 5. Also, the distinction between premeditation and deliberation is sometimes

On the other hand, the number of felony murder defendants who are not intentional killers is unclear but probably not many, which means that few defendants are excluded from the class. More importantly, however, is the undeniable racial impact of the felony murder rule. Even if limited to those felony murderers who intend to kill, a felony murder narrowing device undoubtedly continues to play a major role in placing disproportionate numbers of minority defendants on death row.[71]

F. *The Broad Pecuniary Gain Narrowing Device*

In addition to those states that openly use the felony murder rule as a narrowing device, some states achieve virtually the same effect by allowing a conviction for felony murder and then defining a facially unrelated aggravating circumstance broadly enough to include most of those felony murderers. This process most often occurs with the widely used aggravating circumstance that the murder was committed "for pecuniary gain."[72]

State courts interpreting this aggravating circumstance have tended to do so in one of two ways. Some limit it to cases involving murder for hire or for obtaining specific sums of money, like insurance proceeds or an inheritance.[73] Others broadly construe it to

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more theoretical than real. Many courts require no more than that the defendant intended to kill for an instant to support a finding of premeditation and deliberation, rendering any distinction largely theoretical. *See* 2 W. LAFAVE & A. SCOTT, *supra* note 3, § 7.7(a), at 237.

[71] As of May, 1990, over 49% of the inmates on death row in this country were minority defendants. NAACP Legal Defense and Education Fund, *Death Row U.S.A.* (May 1990).

[72] Committing a murder for pecuniary gain is the most commonly-used factor, being employed in 33 states as of 1984. *See* Special Project, *supra* note 48, at 1227 and n.664.

[73] This narrow interpretation is mandated by statute in some states. *See, e.g.*, OR. REV. STAT. § 163.095(1)(a)&(b) (1987) (hired killer or soliciting another to murder for hire); 42 PA. CONS. STAT. ANN. § 9711(d)(2) (Purdon 1982 & Supp. 1989) (defendant paid killer or was paid to kill); WASH. REV. CODE ANN. § 10.95.020(4) & (5) (Supp. 1989) (murder committed pursuant to agreement to receive money for killing or offering to pay for murder). In addition, Virginia, which narrows first degree murder at the definitional stage, includes as a category the "willful, deliberate and premeditated killing by another for hire." *See* VA. CODE ANN. § 18.2–31(b) (1988). Since Virginia has adopted the "triggerman" rule under which only the actual perpetrator of a homicide, the one who "fired the fatal shot," may be convicted of capital murder, the hiring of another constitutes the sole instance in which the death penalty may be imposed on one who is not the actual killer. *See* Coppola v. Commonwealth, 220 Va. 243, 258, 257 S.E.2d 797, 808 (1979), *cert. denied*, 444 U.S. 1103 (1980).

Other states have statutory provisions which are facially broad or ambiguous, but which have been interpreted narrowly by caselaw. *See, e.g.*, Ashlock v. State, 367 So. 2d 560, 561 (Ala. Crim. App. 1978) (pecuniary gain aggravating circumstances not to be used where defendant intentionally killed while stealing money), *cert. denied*, 367 So. 2d 562 (Ala. 1979); State v. Rust, 197 Neb. 528, 538, 250 N.W.2d 867, 874 (pecuniary gain aggravating circum-

include all felony murder cases where an underlying motive for monetary gain exists, including all robbery murders and most burglary murders.[74] In these latter states, most felony murderers are automatically death eligible without any further narrowing required[75] because most felony murders occur during robberies or other crimes committed for monetary gain.[76] Moreover, if the qual-

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stances do not apply to ordinary robberies), *cert. denied*, 434 U.S. 912 (1977); Boutwell v. State, 659 P.2d 322, 335–36 (Okla. 1983) (pecuniary gain normally applied only to hired killer or hirer of hired killer).

[74] *See, e.g.*, State v. Nash, 143 Ariz. 392, 400–01, 694 P.2d 222, 230–31 (broadly interpreting ARIZ. REV. STAT. ANN. § 13–703(F)(4)&(5) (Supp. 1988)), *cert. denied*, 471 U.S. 1143 (1985); Miller v. State, 269 Ark. 341, 605 S.W.2d 430 (1980) (interpreting ARK. STAT. ANN. § 5–4–604(6) (1987)), *cert. denied*, 450 U.S. 1035 (1981); Raulerson v. State, 420 So. 2d 567, 571 (Fla. 1982) (interpreting FLA. STAT. ANN. § 921.141(5)(f) (West 1984 & Supp. 1989)), *cert. denied*, 463 U.S. 1229 (1983); Pulliam v. State, 236 Ga. 460, 466–67, 224 S.E.2d 8, 13 (interpreting GA. CODE ANN. § 17–10–30(b)(4) (1981)), *cert. denied*, 428 U.S. 911 (1976); Leatherwood v. State, 435 So. 2d 645, 649–50 (Miss. 1983) (interpreting MISS. CODE ANN. § 99–19–101(5)(f) (Supp. 1988)), *cert. denied*, 465 U.S. 1084 (1984); State v. Irwin, 304 N.C. 93, 107, 282 S.E.2d 439, 448 (1981) (interpreting N.C. GEN. STAT. § 15A–2000(e)(6) (1988)).

[75] Use of a broad pecuniary gain aggravating factor allows states to impose liability based on participation in the underlying felony, and, if that felony happens to be robbery, utilize the same factor to justify imposition of the death penalty. This result can occur under the statutory schemes of Arizona, Idaho, and North Carolina. Five states, the so-called 'pure' felony murder states (Florida, Georgia, South Carolina, Tennessee, and Wyoming) achieve the same result by basing culpability for the murder on participation in a felony, and using the same underlying felony as an aggravating circumstance. The robber who commits a murder can be convicted of the murder and found to have two aggravating circumstances steering him toward the death penalty based on the exact same conduct, in essence, "triple jeopardy."

[76] One study found that six of every ten felony murders were armed robbery killings. *See* W. GORDON, *supra* note 64, at 13 (based on national FBI statistics for 1974). Similar results were found in studies on felony-related murders. Murphy's study of defendants convicted of murder with one or more aggravating circumstances in Cook County, Illinois between 1977 and 1980 found that armed robberies comprised 58% of all felony-related murders (93 of 161 cases) and 40% of the total sample (93 of 230). Murphy, *supra* note 64, at 94. In a study of homicides reported in Philadelphia in 1970, 31 of 38 felony-related murder convictions (81.6%) were for armed robbery murders. Zimring, Eigen & O'Malley, *supra* note 40, at 231. In Paternoster's study of 300 homicides with aggravating felonies, armed robbery was the most frequent (230, 77% of all cases), followed by torture (57, 19% of all cases), rape (45, 15% of all cases), larceny with a deadly weapon (38, 13% of all cases), burglary (29, 10% of all cases), housebreaking (22, 7% of all cases). Paternoster, *Prosecutorial Discretion in Requesting the Death Penalty: A Case of Victim-Based Racial Discrimination*, 18 LAW & SOC'Y REV. 437, 446 (1984). Armed robbery felony murders also are extremely likely to lead to a death penalty. *See, e.g.*, Note, *supra* note 37, at 92 (9 out of 10 felony murder death penalties involved armed robbery).

In a study comparing armed robbery murders with jury trials with all defendants convicted of first degree murder in Georgia between 1973 and 1978, the death penalty rate for armed robbery murders was 38% (71 of 188 cases). Baldus, Pulaski & Woodworth, *supra* note 39, at 193, 195. By comparison, the death sentencing rate for those convicted of first degree murder was 19% (113 of 606 cases). *Id.*

Armed robbery felony-related murders also have a high potential for racial bias. In

ity of the narrowing accomplished by a felony murder narrowing device is perverse, the quality produced by a broad pecuniary gain narrowing device is doubly perverse. Like a felony murder narrowing device, a broad pecuniary gain narrowing device excludes most cold-blooded killers while simultaneously making unintentional killers and accomplices with varying degrees of culpability death eligible. This represents the first level of narrowing. As with the pure felony narrowing device, a broad pecuniary gain narrowing device thus fails to pass constitutional muster because it does not identify those defendants more deserving of the death penalty as compared with other first degree murder defendants.[77] A broad pecuniary gain narrowing device, however, goes one step further than the felony murder narrowing device by managing to single out the potentially least culpable defendants in the universe of felony murderers for imposition of the death penalty.

In addition to excluding most cold-blooded killers, a broad pecuniary gain narrowing device excludes defendants who kill during the course of certain felonies. Aside from robbery and burglary, the most common of these predicate felonies for first-degree felony murder are kidnapping, arson, rape, and sexual assault.[78] Yet the fact that the victim's death occurred during the commission of any of these felonies should provide substantially more reason to impose a greater sentence than the fact that the defendant's motive was to obtain money or property.

Block's and Zimring's study of homicides in Chicago between 1965 and 1970, they found that in 1970, the 147 robbery killings comprised 18% of all homicides. Block & Zimring, *Homicide in Chicago, 1965–1970*, 10 J. RES. CRIM. & DELINQ. 1, 7, 8 (1973). In these robbery killings, black defendants were most likely to kill black victims; however, when blacks did kill whites, it was often during an armed robbery. Of the robbery killings committed by blacks, 64% have black victims. *Id.* But of all armed robbery killings where the victim was white, 83% (40 of 48 cases) involved a black defendant. In contrast, of all other killings where the victim was white, only 30% (20 of 67 cases) of the defendants were black.

In the Georgia study by Baldus, Pulaski, and Woodworth, the victim's race was found to produce the greatest bias in armed robbery cases. Baldus, Pulaski & Woodworth, *supra* note 39, at 193, 195. Of all those convicted of first degree murder, the death sentencing rate was 19% (113 of 606 cases). *Id.* For cases with a white victim, the death sentencing rate was 27% (97 of 361 cases), and for black victim cases, 7% (16 of 245 cases). *Id.* By comparison, among those convicted of armed robbery murder, the overall death sentencing rate was 38% (71 of 188 cases). *Id.* The rate for white victim killing was 46% (67 of 146 cases), and black victim killings, 7% (16 of 245 cases). *Id.*

[77] *See supra* notes 67 and 69 and accompanying text.

[78] *See, e.g.*, ALA. CODE § 13A–5–40 (Supp. 1989); ARIZ. REV. STAT. ANN. § 13–1105 (1989); FLA. STAT. ANN. § 782.04 (West Supp. 1989); IDAHO CODE § 18–4003 (1987); OKLA. STAT. ANN. tit. 21 § 701.7 (West Supp. 1989). *See generally* MODEL PENAL CODE § 210.2 comment 6, n.78 (1980) (noting that 31 states have limited the reach of the felony-murder rule to certain statutorily defined felonies, and listing examples).

The terror suffered by the kidnap victim, the widespread danger to innocent lives and property caused by the arsonist, and the suffering and bodily violation endured by victims of sexual assault and rape—a defendant in all of these cases causes more harm and is demonstrably more culpable than the defendant whose underlying crime arises from a desire for gain. Of course, varying degrees of harm and culpability exist in all of these crimes, but, as a whole, it seems impossible to argue that one who kills out of a need for money is more deserving, or even equally deserving, of a death penalty as compared with a rapist or a kidnapper who kills. Yet, along with the cold-blooded non-felony killers, these defendants are excluded by a broad pecuniary gain aggravating circumstance.

G. *Court Treatment of the Felony Murder Narrowing Device*

Courts rarely have addressed use of the felony murder rule as a narrowing device, either alone or in conjunction with a broad pecuniary gain aggravating circumstance.[79] Instead, as in *Loiwenfield*, courts have focused on the repetition issue, not on whether genuine narrowing took place or on the quality of the narrowing. For example, in 1982, in *Collins v. Lockhart*,[80] the Eighth Circuit Court of Appeals invalidated the Arkansas Supreme Court's broad interpretation of its pecuniary gain aggravating circumstance in a felony murder case because the aggravating circumstance failed to narrow

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[79] In *State v. Cherry*, the North Carolina Supreme Court held, as a matter of state law, that the North Carolina merger doctrine prohibited using a felony murder aggravating circumstance if the defendant had been convicted solely of felony murder. 298 N.C. 86, 112–13, 257 S.E.2d 551, 566–68 (1979), *cert. denied*, 446 U.S. 941 (1980). The court did not address any constitutional question in so ruling. *Id.* The North Carolina Supreme Court, however, does allow for a pecuniary gain aggravating factor whenever the defendant has been convicted of felony murder on a robbery murder theory. *See supra* note 74. In *State v. Pritchett*, the defendant raised an eighth amendment challenge to the use of a "during the course of a felony" aggravating circumstance following a felony murder conviction. 621 S.W.2d 127, 140 (Tenn. 1981). After noting its disinclination to follow *Cherry*, the Tennessee Supreme Court never dealt with the merits of the defendant's claim. *Id.* at 141. Instead, it held that "[u]ntil [the United States Supreme] Court instructs otherwise, we reject defendant's argument that the underlying felony cannot be used as an aggravating circumstance." *Id.* In *Jefferson v. State*, the Georgia Supreme Court rejected a direct challenge to the adequacy of its felony murder narrowing device by noting that the Georgia felony murder rule allows a conviction if the homicide occurs during the course of *any* felony, while the aggravating circumstance is limited to homicides occurring during the course of another capital felony (murder, rape, armed robbery, kidnapping), an aggravated battery, or burglary or arson in the first degree. 256 Ga. 821, 829–30, 353 S.E.2d 468, 475 (1987).

[80] 754 F.2d 258 (8th Cir.), *cert. denied*, 474 U.S. 1013 (1985).

the class of death-eligible defendants at the sentencing stage.[81] The Eighth Circuit after *Lowenfield* overturned *Collins*,[82] which also was repudiated by the other circuits.[83]

The Eighth Circuit acted prematurely. *Lowenfield* did not validate the use of felony murder, or pecuniary gain, as a narrowing device. In *Lowenfield*, there *was* genuine narrowing—the defendant was convicted under a section of the Louisiana capital murder statute that provided death-eligibility only for a defendant who intentionally killed two or more people.[84] *Lowenfield* simply held that, because this *genuine* narrowing occurred at the definitional stage, no eighth amendment requirement arose for further narrowing at the sentencing stage.[85]

The question of whether the felony murder rule is a sufficient narrowing device, either by itself or in the guise of a pecuniary gain aggravating circumstance, remains undecided. As a result, defendants continue to be sentenced to death solely because they committed a murder during the course of a felony, that is, simply because they fit into a class of murder defendants that, in some states, is no narrower than before *Furman*.[86]

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[81] *Id.* at 263–64.

> We see no escape from the conclusion that an aggravating circumstance which merely repeats an element of the underlying crime cannot perform this narrowing function. Every robber-murderer has acted for pecuniary gain. A jury which has found robbery murder cannot rationally avoid also finding pecuniary gain. Therefore, the pecuniary-gain aggravating circumstance cannot be a factor that distinguishes some robber-murderers from others. In effect, a robber-murderer enters the sentencing phase with a built-in aggravating circumstance.

Id. at 264.

[82] *See* Perry v. Lockhart, 871 F.2d 1384, 1392–93 (8th Cir.) (concluding that *Collins* was indistinguishable from *Lowenfield* and was thus overruled by it), *cert. denied*, 110 S. Ct. 378 (1989).

[83] *See, e.g.*, McKenzie v. Risley, 842 F.2d 1525, 1539 n.30 (9th Cir.), *cert. denied*, 109 S. Ct. 250 (1988); Ritter v. Thigpen, 828 F.2d 662, 665 (11th Cir. 1987); Wilson v. Butler, 813 F.2d 664, 673 (5th Cir. 1987), *cert. denied*, 484 U.S. 1079 (1988).

[84] Lowenfield v. Phelps, 484 U.S. 231, 246 (1988). Lowenfield himself was convicted of having specific intent to kill or inflict great bodily harm upon more than one person, representing one of the five categories constituting first-degree murder in Louisiana. *Id.* at 243. The sole aggravating factor used to sentence Lowenfield to death was "knowingly creating a risk of death or great bodily harm to more than one person." *Id.* (citing LA. REV. STAT. ANN. 14:30(A)(3) (West 1986)).

[85] "The use of 'aggravating circumstances' is not an end in itself, but a means of genuinely narrowing the class of death-eligible pesons and thereby channeling the jury's discretion. We see no reason why this narrowing function may not be performed by jury findings at either the sentencing phase of the trial or the guilt phase." *Id.* at 230–31.

[86] *See, e.g.*, Randolph v. State, 463 So. 2d 186, 193 (Fla. 1984) (jury instructed on both felony murder and premeditation theories; undifferentiated verdict and felony murder only valid aggravating circumstance), *cert. denied*, 105 S. Ct. 3533 (1985); Armstrong v. State, 399

A proper application of the eighth amendment narrowing requirement in felony murder cases would lessen the chance that an undeserving felony murder defendant, who might not even be guilty of homicide without the rule, would be placed on death row with the most heinous killers. Such an application at least would require for the felony murderer, as well as for the deliberate and premeditated killer, the presence of some other factor in aggravation before the defendant could be sentenced to death. Even a proper application of the narrowing requirement in the felony murder context, however, would not solve the problems caused by the contradictions between the felony murder rule and the goals underlying the Supreme Court's eighth amendment capital jurisprudence. States have adopted an almost infinite variety of narrowing devices,[87] and, in many states, a prior minor conviction for assault, or an escape from a prison sentence imposed for a traffic offense, can make a convicted murderer, including a felony murderer, death-eligible.[88]

The continued use of the felony murder rule, even limited to its traditional form as a basis for a first degree conviction, still creates problems in the attempt to limit the infliction of death to the most

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So. 2d 953, 963 (Fla. 1981) (basis for conviction unclear; only valid aggravating factor was felony murder factor), *later proceeding*, 429 So. 2d 287, *cert. denied*, 464 U.S. 865 (1983). *See also* Hyman v. Aiken, 824 F.2d 1405, 1417 (4th Cir. 1987) (reversing, on other grounds, a South Carolina conviction and sentence based on felony murder instruction and "in the course of a felony" aggravating circumstance).

[87] *See* Special Project, *supra* note 48, at 1227. Aggravating circumstances can be grouped into those which involve the defendant's motive, method or manner of committing the crime, circumstances surrounding its commission, the defendant's status background, and the identity of the victim. *Id.* Examples of aggravating circumstances relating to motive are pecuniary gain, avoiding arrest, or hindering governmental or law enforcement functions. *Id.* at 1227–28 and nn. 664–67. Methods of commission include cruelty, variously described as "heinous," "atrocious," "cruel," "outrageously or wantonly vile," "horrible," "inhuman," or "exceptionally brutal." Others frequently included are lying in wait, torture, poison or use of explosives. *Id.* at 1228–29 nn. 668–75. Circumstances surrounding the crime, such as committing the crime in connection with another felony, holding the victim for ransom, as a hostage, or as a shield may serve as aggravating circumstances. *Id.* at 1230–31 nn. 679–84. The defendant's background may be an aggravating factor. Such factors as status as a prisoner or prior commission of a felony qualify as aggravating factors in many states. *Id.* at 1229–30 nn. 676–78. Finally, the identity of the victim often is used as an aggravating factor. Police officers, firemen, corrections employees, judges and prosecutors most often comprise this category, although the fact that the victim was, or could potentially have been, a witness against the defendant is also common, as are "multiple victim" aggravating circumstances. *Id.* at 1231–32 nn. 685–90.

[88] Special Project, *supra* note 48, at 1229–30 nn. 676–77 (24 states consider the defendant's status as a prisoner an aggravating circumstance while 21 states consider a prior violent felony or history of violence an aggravating circumstance).

deserving defendants. Because the rule allows a conviction without a real examination of blameworthiness, it creates an opportunity for death to be imposed on a defendant with limited culpability for the homicide committed. This consequence represents a problem of disproportionality. It is in this realm that the Supreme Court has labored to find a way to address the clash of the two doctrines.

V. Felony Murder Accomplices and a Bright Line Rule of Disproportionality

A. *The Eighth Amendment and Disproportionality in Non-Capital Cases*

Although the eighth amendment contains no explicit prohibition against disproportionate sentences, the Supreme Court has held that the cruel and unusual punishment clause of that amendment bans sentences that are grossly disproportionate to the crime of which the defendant is convicted.[89] In *Solem v. Helm*,[90] the Court's most recent and most extensive opinion on the scope of the disproportionality principle in non-capital cases, Justice Powell noted that, "as a matter of principal," a sentence must be proportionate to the crime of which the defendant has been convicted,[91] and that "no penalty is *per se* constitutional."[92] These pronouncements suggest not only that every criminal defendant has a right to a sentence

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[89] The history of the meaning of the eighth amendment's cruel and unusual punishment clause has long been debated by scholars. The eighth amendment is identical to the provision found in the English Bill of Rights of 1689. *See* 1 W. & M., sess. 2, c.2. Anthony Granucci contends that the original intent of the framers of the United States Constitution was to limit the eighth amendment to prohibiting cruel methods of punishment and not disproportionate sentences. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 Calif. L. Rev. 839, 860 (1969). He further argues, however, that the framers were acting out of a misinterpretation of the English Bill of Rights, which prohibited both. *Id.* at 855–56. Others argue that the framers intended the eighth amendment to prohibit both disproportionate sentences and cruel methods of punishment. *See generally* Comment, *The Eighth Amendment, Becarria, and the Enlightenment: An Historical Justification for the* Weems v. United States *Excessive Punishment Doctrine*, 24 Buffalo L. Rev. 783 (1975). Charles Schwartz argues that, even if the framers misinterpreted the English Bill of Rights, as suggested by Granucci, the relevant starting point is with the framers' intent for "cruel and unusual," which was that the provision should be limited to prohibiting barbarous punishment. Schwartz, *Eighth Amendment Proportionality Analysis and the Compelling Case of William Rummel*, 71 J. Crim. L. & Criminology 378, 380–82 (1980). This division of views also is reflected on the Supreme Court, with the majority in Solem v. Helm, 463 U.S. 277, 285–86 (1983), holding that the framers adopted the principles of proportionality along with the English Bill of Rights, and the dissenters rejecting this analysis. *Id.* at 313 (Burger, C.J., dissenting).

[90] 463 U.S. 277 (1983).

[91] *Id.* at 290.

[92] *Id.*

that is not disproportionate to the crime committed, but also that each defendant has an equal right to a determination of this question as a matter of federal constitutional law.

In theory, these propositions are true, but in practice, the efficacy of the proportionality principle is quite limited. Justice Powell conceded in *Helm* that a successful proportionality challenge in a non-capital case would be "exceedingly rare,"[93] although, by holding a sentence of imprisonment disproportionate, he and his brethren in the majority were not quite willing to make it as rare as the dissenters wished. Outside of capital cases, the Supreme Court itself has found a sentence grossly disproportionate only on three occasions, all of which involved extremely unusual circumstances.

In *Weems v. United States*,[94] the Court held disproportionate a sentence of 15 years of *cadena temporal* imprisonment for the crime of falsifying a public document.[95] This punishment was part of the imperial legacy we inherited from Spain when we seized the Phillipine Islands, and required that the imprisonment include both hard labor in chains and severe civil disabilities.[96] In *Robinson v. California*,[97] the Court held disproportionate a sentence of ninety days imprisonment because the defendant had not committed any crime and had received his sentence for the status of being a drug

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[93] *Id.* at 289–90 (citing Rummel v. Estelle, 445 U.S. 263, 272 (1980)).

[94] 217 U.S. 349 (1910).

[95] *Id.* at 382.

[96] *Id.* at 364. The defendant in *Weems* was a minor governmental official. Weems' crime consisted of entering on the books as paid the sums of 208 and 408 pesetas as wages to lighthouse keepers when, in fact, such sums had not been paid. *Id.* at 357–58. The government made no allegations of fraud, desire to defraud, or personal enrichment. The offense consisted merely of intentionally falsifying the record. According to Phillipine law, the punishment of *cadena temporal* was defined as "labor for the benefit of the state." *Id.* at 364. Those sentenced under its provisions "shall always carry a chain at the ankle, hanging from the wrists; they shall be employed at hard and painful labor and shall receive no assistance whatsoever from without the institution." *Id.* Additionally, the sentence carried certain accessory penalties, including civil interdiction (deprivation of rights of parental authority, guardianship of person or property, and the right to dispose of his own property by inter vivos acts), perpetual absolute disqualification (deprivation of office, even if held by popular election, of the right to vote or be elected to public office, retirement pay, and certain honors) and subjection to surveillance during life. *Id.* Justice McKenna, writing for the Court, recognized that "it is a precept of justice that punishment for crime should be graduated and proportioned to offense." *Id.* at 367. The opinion then compared Weems' sentence with other sentences imposed for similar crimes in other jurisdictions and less onerous sentences imposed for more severe crimes within the Phillipines. In the Court's view, this comparison showed "more than different exercises of legislative judgment. It is greater than that. It condemns the sentence in this case as cruel and unusual." *Id.* at 381.

[97] 370 U.S. 660 (1962).

addict.[98] Lastly, in *Helm*, the trial court had imposed a sentence of life without parole on a repeat minor offender.[99] The absence of the possibility of parole was sufficient to prod the Court into distinguishing two prior cases in which it had noted no eighth amendment problems with extremely long sentences for defendants convicted of exceedingly minor crimes.[100]

The reluctance of the Court to find gross disproportionality in non-capital sentences does not, however, necessarily limit the scope of any review for disproportionality in capital cases. As the Court noted in *Helm*, disproportionality is an appropriate and special concern in capital cases.[101]

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[98] *Id.* at 665. The statute in *Robinson* made addiction to the use of narcotics a misdemeanor punishable by imprisonment. The Court focused on the classification of narcotics addiction as an illness and that the statute punished the defendant, not for use or possession of illegal narcotics, but merely for his status as an addict. *Id.* at 666–67. In holding the sentence disproportionate, the Court stated that disproportionality is "a question which cannot be considered in the abstract. Even one day in prison would be cruel and unusual punishment for the 'crime' of having a common cold." *Id.* at 667.

[99] *See* 463 U.S. 277, 296–97 (1983). Helm was convicted after pleading guilty to uttering a no-account check for $100 under a statute which stated: "When a defendant has been convicted of at least three prior convictions in addition to the principal felony, the sentence for the principal felony shall be enhanced to the sentence for a Class 1 felony." S.D. CODIFIED LAWS ANN. § 22–7–8 (1979) (amended 1981) (quoted in Solem v. Helm, 463 U.S. at 281). His prior convictions involved six nonviolent felonies. 463 U.S. at 279–80. Helm appealed his sentence to the South Dakota Supreme Court, which affirmed in a 3-2 decision. State v. Helm, 287 N.W.2d 497, 499 (1980). He then requested that the governor commute his sentence but this request was denied. *Solem*, 463 U.S. at 283. Helm then sought habeas relief in the federal district court, which denied his petition without a hearing. Helm v. Solem, No. CIV81–5148, slip op. at 1 (D.S.D. Dec. 12, 1981). On appeal to the Eighth Circuit, the decision of the district court was reversed on eighth amendment grounds. Helm v. Solem, 684 F.2d 582, 587 (8th Cir. 1982), 463 U.S. at 283.

[100] The two prior cases were Hutto v. Davis, 454 U.S. 370 (1982) and Rummel v. Estelle, 445 U.S. 263 (1980). In *Hutto*, the defendant was convicted of possession with intent to distribute and distribution of nine ounces of marijuana and sentenced to 40 years' imprisonment under Virginia law. 454 U.S. at 370–71. In *Rummel*, the defendant was convicted of a third felony, all involving credit card or bad check transactions, which totalled less than $300, and sentenced to life in prison (with the possibility of parole) under the Texas recidivist statute. 445 U.S. at 266.

Following the Supreme Court's lead, the lower federal courts rarely have found non-capital sentences disproportionate under the eighth amendment. In fact, even after *Helm*, some federal courts refuse to even examine a case for disproportionality if the defendant's sentence of imprisonment is less severe than life without parole. *See, e.g.*, United States v. Rosenberg, 806 F.2d 1169, 1175 (3d Cir. 1986) (no need for Court to conduct disproportionality analysis if sentence is less than life without parole), *cert. denied*, 481 U.S. 1070 (1987); United States v. Rhodes, 779 F.2d 1019, 1027–28 (4th Cir. 1985) (same), *cert. denied*, 476 U.S. 1182 (1986); *cf.* Marrero v. Dugger, 823 F.2d 1468, 1472 (11th Cir. 1987) (disproportionality analysis permissible even for lesser sentence), *cert. denied*, 485 U.S. 965 (1988).

[101] *See* 463 U.S. at 289 (acknowledging the Court's previous application of the disproportionality principle in capital cases, and that "the penalty of death differs from all other

B. *Disproportionality in Capital Cases—The General Approach*

Some states have statutes requiring their supreme courts to compare one death sentence against others returned in that state to determine if that sentence is excessive or disproportionate in relation to these other sentences.[102] In 1984, in *Pulley v. Harris*,[103] the United States Supreme Court held that this comparative proportionality review was not constitutionally required.[104] In doing so, however, the Court was careful to distinguish this comparative review from the constitutional review for disproportionality required by the eighth amendment in both capital and non-capital cases.[105]

In *Harris*, as well as in other cases, the Court has tended to discuss eighth amendment disproportionality review in capital and non-capital cases as if they were identical, often citing capital disproportionality cases as governing precedent in non-capital cases and vice-versa.[106] To some degree, this is accurate in that both capital and non-capital cases certainly are based on the same eighth amendment principles and concerns. Moreover, in both types of cases, the Court requires that the decision on possible disproportionality of the sentence be guided by similar objective criteria—the seriousness of the offense, the harshness of the penalty, and the penalties imposed on similarly situated defendants in that and other jurisdictions.[107]

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forms of criminal punishment, not in degree but in kind") (quoting Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring)). *See also Rummel*, 445 U.S. at 272 (noting uniqueness of death penalty in context of disproportionality analysis).

[102] *See, e.g.*, GA. CODE ANN. § 17–10–35(c)(1982); N.C. GEN. STAT. § 15A–2000(d)(2)(1989).

[103] 465 U.S. 37 (1984).

[104] *Id.* at 50–54. Justice White, writing for the majority, concluded that this comparative review, while appropriate, was not a necessary component of a constitutional capital punishment system. *Id.* at 50.

[105] *Id.* at 42–43. In fact, one of the Court's reasons for finding the comparative review unnecessary was the continued protection offered by the eighth amendment disproportionality principle. *Id.* at 43.

[106] *See, e.g.*, Tison v. Arizona, 481 U.S. 137, 148 (1987) (capital case citing *Weems*); *Id.* at 179 (Brennan, J., dissenting) (citing *Solem*); Solem v. Helm, 463 U.S. 277, 288 (1983) (citing *Enmund, Coker* and *Gregg*); *Id.* at 291–92 (citing *Enmund* and *Coker*); Enmund v. Florida, 458 U.S. 782, 788 (1982) (citing *Weems*).

[107] *See, e.g., Solem*, 463 U.S. at 290–92 (relying on two capital cases, Enmund v. Florida, 458 U.S. 782 (1982) and Coker v. Georgia, 433 U.S. 584 (1977), for objective criteria to be used in non-capital disproportionality review). The Court has not always been consistent in its use of these criteria. *Compare Enmund*, 458 U.S. at 790–96 (looking at both legislative enactments and sentencing decisions) *with Tison*, 481 U.S. at 152–55 (relying solely on legislative enactments). The majority of the Court has held consistently that, although guided by these objective criteria, the Court ultimately must make its own decision on disproportionality.

The differences between capital and non-capital cases, nevertheless, are significant, and go far beyond the evident fact that one of the criteria examined, the harshness of the penalty, is a constant in all capital cases. The first distinction between the two modes of proportionality review occurs when the Court makes its initial proportionality determination. In a non-capital case, the Court evaluates whether *this* sentence is disproportionate to the crime committed by *this* defendant. Therefore, under *Helm*, when a court undertakes a review for disproportionality, it must examine the totality of circumstances surrounding the defendant and his crime.[108] The principal focus is on the crime and the sentence in question but other factors, such as the defendant's past criminal record, also are considered.[109] As in all totality of the circumstances tests, no one factor is dispositive.[110]

In capital cases, the Court so far has used an approach with a narrower focus and a broader impact. In determining the disproportionality question in the first instance, the Court has focused on a single aspect of the defendant or the crime, such as the age of the defendant or the absence of a death in the crime. It has based its disproportionality determination solely on whether the presence or absence of this single factor makes the death penalty grossly disproportionate.[111] If this determination is made in the defendant's favor, the Court establishes a categorical bright-line rule, which prohibits a death sentence for any defendant within the specified category.

Thus, in *Coker v. Georgia*,[112] the death penalty was disproportionate for the rapist solely because a life had not been taken during his crime.[113] The other circumstances in the case, including Coker

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See Stanford v. Kentucky, 109 S. Ct. 2969, 2981 (1989) (O'Connor, J., concurring); *Tison*, 481 U.S. at 155–58; *Enmund*, 458 U.S. at 797–801.

[108] 463 U.S. at 290–92.

[109] *Id.*

[110] *Id.* at 291 n.17 (noting that "no one factor will be dispositive in a given case," so courts must rely on "a combination of objective factors").

[111] *See, e.g.*, Thompson v. Oklahoma, 487 U.S. 815, 838 (1988) (Stevens, J.) (execution of any person under age 16 at time of murder committed prohibited by eighth amendment); *Stanford*, 109 S. Ct. at 2980 (execution of any defendant between ages 16 and 18 at time murder committed not disproportionate under eighth amendment); Coker v. Georgia, 433 U.S. 584, 587 (1977) (capital punishment disproportionate for any rape of adult woman).

[112] 433 U.S. 584 (1977).

[113] *Id.* at 598. Justice White, writing for a four-Justice plurality, proscribed the death penalty for any rapist of an adult victim who does not take a life. Even though Coker previously had been convicted of murder, rape and kidnapping, and even though he committed the rape during the course of an armed robbery, he could not be put to death. *Id.* at

being a prison escapee who committed armed robbery and kidnapping along with his rape, or that he previously had been convicted of rape, murder, kidnapping, and aggravated assault, simply were not germane to the Court's disproportionality inquiry.[114] Nor would these or any other circumstances be relevant in any other capital rape case. After *Coker*, all such defendants are protected from the death penalty.[115]

The differences between the disproportionality review in *Helm* and that in *Coker* also affect the nature of a subsequent disproportionality challenge, based on the rulings in these cases. A court conducting a disproportionality inquiry in a non-capital case under *Helm* must make a detailed factual and legal inquiry to determine whether the sentence violates the eighth amendment.[116] In contrast,

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598–99. Justices Brennan and Marshall separately concurred, based on their previous opinions that the death penalty was *per se* unconstitutional. *Id.* at 600 (Brennan and Marshall, JJ., concurring). Justice Powell concurred in the holding that Coker's death sentence was disproportionate, but objected to the establishment of a categorical rule, expressing his belief that the death penalty could be proportionate for a rape committed with excessive brutality. *Id.* at 601 (Powell, J., concurring and dissenting).

The plurality used a two-part disjunctive test to determine whether the death penalty was excessive and thus grossly disproportionate. According to this test, a punishment is excessive if it either "makes no measurable contribution to the acceptable goals of punishment," or "is grossly out of proportion to the severity of the crime." *Id.* at 592. The plurality concluded that the death penalty for rape was excessive under the second part of the test. *Id.* The Court noted that Georgia was the only state currently imposing the death penalty for rape of an adult woman, and that even in Georgia, less than one out of ten juries imposed the death penalty in rape cases. *Id.* at 595–596. These statistics provided objective support for the Court's finding of disproportionality, but the ultimate decision was the Court's.

[114] *See* 433 U.S. at 587. *Coker*, by its terms, only invalidated capital punishment for the rape of an adult woman. At the time of *Coker*, three states, Florida, Mississippi and Tennessee, also authorized the death penalty when the rape victim was a child. The Mississippi and Florida statutes remain on the books today. *See* MISS. CODE ANN. § 97–3–65(1) (Supp. 1988) (when victim under 14 and rapist over 18); FLA. STAT. ANN. § 794.011(2) (West Supp. 1989) (when victim under 12 and rapist over 18), but their validity is questionable. Florida subsequently has held that a death penalty under § 794.011(2) is prohibited constitutionally. Buford v. State, 403 So. 2d 943, 951–52 (Fla. 1981), *cert. denied*, 454 U.S. 1163 (1982). The situation in Mississippi is still unclear. *See, e.g.*, Jackson v. State, 452 So. 2d 441, 450 (Miss. 1984) (defendant received life sentence; capital punishment provision discussed). As noted earlier, every defendant now on death row has been convicted of homicide. *See supra* note 21.

[115] Justice Powell, concurring and dissenting in *Coker*, resisted the creation of a categorical rule. He would have found Coker's death sentence disproportionate, but would have allowed for the possibility of a death sentence in a case in which the defendant caused "serious, lasting harm to the victim." 433 U.S. at 601, 604 (Powell, J., concurring and dissenting).

[116] In *United States v. Ortiz*, a heroin distribution case, the court reviewed the quantity of drugs sold; the nature of the transactions; the defendant's criminal record; the length of prison sentence in comparison to the statutory maximum; parole expectations given gravity of offense; federal sentences for similar as well as dissimilar crimes in the same jurisdiction; and sentences imposed for the commission of the same crime in other federal jurisdictions.

an inquiry based on a *Coker* challenge is fundamentally different. A court merely has to determine a simple historical fact—whether the defendant's acts caused a loss of life.[117] If the defendant falls on the right side of the bright-line, he or she cannot be executed.

Finally, a categorical *Coker*-type disproportionality review is one-sided. When a court rules on a *Helm* disproportionality challenge, it makes a ruling one way or another on the disproportionality question. The sentence is either grossly disproportionate or it is not. When a court makes a finding that a defendant does not fit under the protections of a specified categorical rule, however, the result is different. A holding that a defendant's crime involves the taking of a life and therefore does not fall under the rule of *Coker* does not mean that a death sentence is proportionate for that defendant. The holding means only that the defendant does not get the benefit of that particular rule.

By using this categorical approach to disproportionality review, the Supreme Court has tried to solve the contradictions between the felony murder rule and its eighth amendment capital punishment law. Concentrating on one class of felony murder defendants, accomplices to the felony, the Court has sought to develop a bright-line to insulate the least culpable of these defendants from the reach of the death penalty.

C. Lockett v. Ohio — *Flirting With a Bright Line*

Although several of the early eighth amendment capital cases, including *Furman*, were felony murder cases, the Court did not begin to grapple with the interaction between the two doctrines until 1978 in *Lockett v. Ohio*.[118] *Lockett* was a classic felony murder case in many ways. Sandra Lockett and her confederates planned to rob a pawn shop. On the day of the crime, Sandra stayed in the car while the others went into the shop. They had no plan to kill or injure anyone but the pawnbroker was fatally shot when he grabbed the gun carried by one of the accomplices, causing the gun

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742 F.2d 712, 713–17 (2d Cir. 1984), *cert. denied*, 469 U.S. 1075 (1985). *See also* United States v. Milburn, 836 F.2d 419, 420–22 (8th Cir.) (same), *cert. denied*, 487 U.S. 1222 (1988); United States v. Darby, 744 F.2d 1508, 1525–29 (11th Cir. 1984) (using totality of circumstances approach in narcotics case), *cert. denied*, 471 U.S. 1100 (1985).

[117] *See, e.g.*, Cabana v. Bullock, 474 U.S. 376, 386 (1986) (distinguishing simple factual inquiry after *Enmund*, from totality of the circumstances inquiry required by *Solem v. Helm*).

[118] 438 U.S. 586 (1978).

to discharge. Lockett received the death penalty for her role in the crime.[119]

At the time the Court decided *Lockett*, the disproportionality of the death penalty for a defendant like Sandra Lockett, an accomplice to an accidental felony murder, was still an open question. The Court already had held in *Coker* that the death penalty could not be imposed on a rapist[120] but, in 1976, the Court had held that the death penalty was not invariably disproportionate for deliberate murder.[121] Lockett obviously fell between these two cases.

Seven of the eight Justices participating in the decision voted to overturn the death penalty because of Lockett's minor role in the killing.[122] The four Justice plurality, however, adopted a proceduralist approach. Without addressing the proportionality question, they reversed the death sentence because the Ohio capital sentencing scheme did not allow the sentencer to give sufficient mitigating weight to Lockett's role as a minor accomplice in a felony murder.[123]

The other four Justices each wrote separately. Each set out his views on the disproportionality *vel non* of a death sentence for a felony murder accomplice. Justice Rehnquist noted that the felony murder rule was based on "[c]enturies of common law doctrine," and he saw no reason to question the right of the states to continue to utilize it as a basis for capital punishment.[124] Conversely, Justice Marshall viewed the imposition of a death penalty following a felony murder conviction as inevitably leading to "lightning bolt," "freakish," and "wanton" executions in violation of *Furman*.[125] Justice Blackmun acknowledged that the imposition of the death penalty on a felony murder accomplice "might skirt the limits of the Eighth Amendment proscription . . . against gross disproportionality,"[126]

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[119] *Id.* at 590.

[120] *See supra* note 107 and accompanying text.

[121] Gregg v. Georgia, 428 U.S. 153, 187 (1976) (plurality opinion); *see also supra* note 202 and accompanying text.

[122] Only Justice Rehnquist voted to uphold the death sentence. *Lockett*, 438 U.S. at 626 (Rehnquist, J., dissenting). Chief Justice Burger's plurality opinion was joined by Justices Stevens, Stewart and Powell, the three Justices who had formed the decisive plurality in the 1976 cases. *Id.* at 589. Justices Blackmun, Marshall and White all concurred separately. *Id.* at 613 (Blackmun, J., concurring), 618 (Marshall, J., concurring), 621 (White, J., concurring). Justice Brennan did not participate in the decision.

[123] *Id.* at 605–09. In a final footnote, Justice Burger noted that, because of the procedural holding, there was no need to address the disproportionality issue. 438 U.S. at 609 n.16.

[124] *Id.* at 628, 635 (Rehnquist, J., concurring and dissenting).

[125] *Id.* at 619–20 (Marshall, J., concurring).

[126] *Id.* at 613–14 (Blackmun, J., concurring).

but was not convinced that a workable disproportionality rule could be devised. He therefore approved, as the "more manageable alternative," the plurality's approach of requiring the sentencer to consider the defendant's degree of participation as a mitigating factor.[127]

For the purposes of this Article, Justice White's opinion was the most significant. He was the first Justice to suggest dealing with the disproportionality problem in felony murder capital cases by drawing a line down the middle of the felony murder doctrine in order to distinguish those felony murderers who can receive the death penalty from those who cannot.[128] Additionally, in the three subsequent capital cases in which the Court grappled with the problem of disproportionality in the felony murder context, Justice White has had the decisive vote.[129] With the other eight Justices evenly divided, Justice White has played the key role in the Court's attempt to resolve the felony murder/capital punishment dilemma. His opinions have set the terms of the debate, and his shifting votes have shaped the outcome.

Unlike Justice Marshall, Justice White did not directly attack the felony murder rule. In contrast to Justice Rehnquist, he did not consider the centuries of common law pedigree of the rule sufficient to end all inquiry. Disagreeing with Justice Blackmun's pessimism, he discerned a workable bright-line rule of disproportionality, a rule based on the *mens rea* of the defendant. Using the disproportionality analysis that he had articulated the year before in his plurality opinion in *Coker*,[130] Justice White argued that imposition of death on a defendant who did not intend to kill is grossly disproportionate to the severity of the crime, "makes no measurable contribution to acceptable goals of punishment," and therefore vi-

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[127] *Id.* at 614–15 (Blackmun, J., concurring). In a footnote, Justice Blackmun discussed at length the difficulties involved in establishing a categorical rule based upon the *mens rea* of the defendant. Foreshadowing many of the arguments made by Justice O'Connor in her dissent in *Enmund* and in her majority opinion in *Tison*, he argued that such a categorical rule is inappropriate for both the actual killer and the accomplice. *Id.* at 614–15 n.2 (Blackmun, J., concurring).

[128] *Id.* at 626.

[129] The three cases are Enmund v. Florida, 458 U.S. 782 (1982), Cabana v. Bullock, 474 U.S. 376 (1986), and Tison v. Arizona, 481 U.S. 137 (1987). All are discussed extensively *infra*. Justices Brennan, Marshall, Blackmun, and Stevens voted together in all three cases to reverse the death penalty, joining Justice White's majority opinion in *Enmund* and dissenting in *Bullock* and *Tison*. On the other side in all three cases were Justice O'Connor, Justice Powell and (now Chief) Justice Rehnquist, joined by Chief Justice Burger in *Enmund* and Justice Scalia in *Bullock* and *Tison*.

[130] See *supra* note 113 for a more complete discussion of *Coker*.

olates the eighth amendment.[131] He noted that a line could be drawn "between the culpability of those who acted with and those who acted without a purpose to destroy life," and concluded that those who acted without a purpose to destroy life should be ineligible for execution.[132]

The extended discussions of the felony murder issue in *Lockett* gave notice that the Court would revisit the issue. Earl Enmund and the Florida courts provided the opportunity.

D. Enmund v. Florida — *Creating a Line?*

Like Sandra Lockett, Earl Enmund was a "wheelman" in an armed robbery. He never left the car while his co-defendants went to rob the victims at their farmhouse.[133] As in *Lockett*, the killing in *Enmund* was unplanned; one of the victims started the gun battle which led to the deaths of both victims and the wounding of a co-defendant.[134] Although Enmund was not physically present at the killing, the Florida Supreme Court held in affirming Enmund's conviction and sentence of death that he unquestionably was guilty of first-degree murder, and thus eligible for the death penalty under Florida's felony murder rule.[135]

Justice White, writing for the five-Justice majority, found Enmund's death penalty disproportionate under the eighth amendment. Looking at both legislative enactments and sentencing statistics, he perceived a societal consensus rejecting the death penalty for a felony murder accomplice, such as Enmund.[136] As he did in

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[131] Lockett v. Ohio, 438 U.S. 586, 626 (1978). Thus, in Justice White's opinion, the death penalty for a defendant who does not intend to kill fails under both prongs of the test he articulated in *Coker*. See *supra* note 113 for a description of the *Coker* test.

[132] 438 U.S. at 626 (White, J., concurring and dissenting).

[133] Enmund v. Florida, 458 U.S. 782, 784 (1982).

[134] *Id.* Despite the complete lack of evidence placing *Enmund* at the farmhouse where the killing took place, the trial court had concluded that he was the triggerman in the killings. *Id.* at 787 n.2 (citing Enmund v. State, 399 So. 2d 1362, 1372 (Fla. 1981)).

[135] Enmund v. State, 399 So. 2d 1362, 1370 (Fla. 1981). The Florida Supreme Court overturned two of the four aggravating circumstances found by the trial court, but affirmed the death sentence because of the two remaining aggravating circumstances and the lack of any mitigating circumstances. *Id.*

[136] Justice White analyzed the use of capital punishment for non-triggermen convicted of felony murder according to the test set out in *Coker v. Georgia*. See *supra* note 113 for a description of the test. As evidence of legislative judgments rejecting the death penalty, he found that only 8 of the 36 jurisdictions authorizing the death penalty allowed imposition of capital punishment "solely for participation in a robbery in which another robber takes life." *Enmund*, 458 U.S. at 789, 792 n.5. Justice White divided the remaining states into several groups ranging from those in which felony murder is not a capital crime, through those

Lockett, Justice White focused on the *mens rea* of the defendant as the key element in the proportionality analysis. In contrast to his *Lockett* opinion, however, Justice White's opinion in *Enmund* displayed on its surface a marked ambivalence about creating a categorical rule requiring a purpose to kill. At several points in his opinion, Justice White described the new rule as one that prohibits the execution of a defendant who does not kill, attempt to kill, or intend to kill.[137] Elsewhere, he indicated that the death penalty might be appropriate for an accomplice who "contemplated that life would be taken"[138] or "anticipated that lethal force would be used."[139] He never addressed the applicability of the rule to a felon who personally causes an accidental death in the course of a felony.[140] Justice White muddied the waters even further by implying that the error of the Florida Supreme Court lay in its failure to find any culpability at all based on Enmund's individual role in the killing,[141] and by emphasizing the fact that Enmund was not present at the scene of the killing.[142]

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which require intent or proof of a culpable mental state short of intent, to states that simply require something more than mere participation. *Id.* at 789–92 & nn.6–13. Justice O'Connor, writing in dissent, criticized what she termed Justice White's "curious method of counting" and concluded that 23 states would permit imposition of the death penalty "even though the felony murderer has neither killed nor intended to kill his victim." *Id.* at 822 (O'Connor, J., dissenting).

[137] *Id.* at 787 (the question presented is whether "death is a valid penalty under the Eighth and Fourteenth Amendments for one who neither took life, attempted to take life, nor intended to take life"); *id.* at 793 ("current legislative judgment with respect to imposition of the death penalty where a defendant did not take life, attempt to take it, or intend to take life" weighs on the side of rejecting capital punishment); *id.* at 797 ("[W]e are not aware of a single person convicted of felony murder over the past quarter century who did not kill or attempt to kill, and did not intend the death of the victim, who has been executed . . . .").

[138] *Id.* at 801. Justice White never elaborates on his "contemplation" formulation. It seems most closely to approximate the Model Penal Code culpability requirement of "knowingly," which would require that the defendant be aware that it is "practically certain" that his conduct would cause a death. MODEL PENAL CODE § 2.02(2)(b)(ii) (1980).

[139] *Enmund*, 458 U.S. at 787.

[140] In this respect, Justice White's opinion in *Enmund* seems to indicate a retreat from his position in *Lockett*, where he strongly advocated a rule which would insulate from the death penalty actual killers who lacked an intent to kill as well as accomplices who acted without an intent to kill. See *supra* note 131 and accompanying text for a discussion of Justice White's opinion in *Lockett*. Of course, it was unnecessary to reach that issue in the case because Enmund was an accomplice. Justice White's seeming retreat perhaps was necessary to gain the vote of Justice Blackmun, who, in *Lockett*, had indicated a strong opposition to extending an intent-to-kill rule to an actual killer. Lockett v. Ohio, 438 U.S. 586, 614 n.2 (1978).

[141] *Enmund*, 458 U.S. at 793, 800.

[142] *Id.* at 786, 788 & n.2 (quoting Enmund v. State, 399 So. 2d 1362, 1370 (Fla. 1981)) (Florida Supreme Court held that the record supported no more than the inference that Enmund was the person in the car by the side of the road at the time of the killings). In his

Not surprisingly, the *Enmund* opinion caused a great deal of confusion about defining the rule of *Enmund*, if indeed a rule existed. Although some courts agreed with Justice O'Connor's conclusion that the majority had drawn a bright-line rule of preclusion requiring an intent to kill,[143] other courts seized on the "contemplation that life would be taken" and "anticipation of lethal force" language as the true minimum threshold.[144] A few courts even saw in *Enmund* only a case-specific proportionality ruling and limited it to its facts, especially the absence of Enmund from the scene of the killing.[145]

As a way to resolve the inherent contradictions between the eighth amendment and the felony murder rule, *Enmund* represented a positive but halting step forward. That the Court even had

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discussion of statistics, Justice White also mentioned that of the 739 inmates under death sentences for homicide for whom sufficient data were available, only 16 "were not physically present when the fatal assault was committed." *Id.* at 795.

[143] *Id.* at 810 (O'Connor, J., dissenting) (defendant "contends that because he had not actual intent to kill the victims . . . capital punishment is too extreme a penalty"). For cases reading *Enmund* as requiring an intent to kill, see, e.g., Carlos v. Superior Court, 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983) (subsequently overruled in People v. Anderson, 43 Cal. 3d 1104, 742 P.2d 1306, 240 Cal. Rptr. 585 (1987)); State v. Gerald, 113 N.J. 40, 549 A.2d 792 (1988).

Justice O'Connor's major complaint with the majority opinion was that she viewed it as "recasting intent as a matter of federal constitutional law." *Enmund*, 458 U.S. at 802, 824. She criticized the "intent to kill requirement" as failing to take into account the "complex picture of the defendant's knowledge of his accomplice's intent and whether he was armed, and the defendant's contribution to the planning and success of the crime, and the defendant's actual participation during the success of the crime." *Id.* at 825. She also stated that prohibiting the death penalty for accomplice felony murder would create a new category of murder. *Id.* n.41. Despite quarreling with the majority's creation of a categorical rule of exclusion, Justice O'Connor indicated that she would remand *Enmund* based on the failure of the trial court to adequately consider the evidence of Enmund's minor role in mitigation. *Id.* at 828–29.

[144] *See, e.g.*, Skillern v. Estelle, 720 F.2d 839, 843 (5th Cir. 1983), *cert. denied*, 469 U.S. 873 (1984); Clines v. State, 280 Ark. 77, 83, 656 S.W.2d 684, 686 (1983), *cert. denied*, 465 U.S. 1051 (1984); People v. Davis, 95 Ill. 2d 1, 53, 447 N.E.2d 353, 378, *cert. denied*, 464 U.S. 1001 (1983).

[145] *See, e.g.*, Allen v. State, 253 Ga. 390, 395, 321 S.E.2d 710, 715 (1984) (defendant here was active participant; Enmund's responsibility was "more attenuated"), *cert. denied*, 470 U.S. 1059 (1985); James v. State, 453 So. 2d 786, 792 (Fla. 1984) (defendant was present and actively participating; distinguished from *Enmund*), *cert. denied*, 469 U.S. 1098 (1984). The degree of confusion following *Enmund* perhaps can be illustrated best by the fact that the Florida Supreme Court decided three cases within the same year, each based on a different interpretation of *Enmund*, seemingly choosing whichever theory best fit the case at hand. *Compare* James v. State, 453 So. 2d 786, 792 (Fla. 1984), *cert. denied*, 469 U.S. 1098 (1984) *with* Funchess v. State, 449 So. 2d 1283, 1286 (Fla. 1984) (*Enmund* does not apply to actual killer) *and* Copeland v. State, 457 So. 2d 1012, 1019 (Fla. 1984) (defendant's participation sufficient to support the conclusion that he "contemplated that life would be taken or anticipated that lethal force would be used"), *cert. denied*, 471 U.S. 1030 (1985).

attempted to remove some felony murder defendants from the reach of the death penalty served at least as a warning to the state courts that death penalties based on felony murder convictions were suspect. Moreover, even the narrowest reading of the case leads to the elimination of the death penalty for some minor accomplices not present at the crime. But the varying interpretations of the proposed rule of the case meant that the scope of protection it offered depended primarily on which state was trying to apply it. This variability seriously undermined its effectiveness as a categorical bright-line rule of disproportionality.[146]

E. Cabana v. Bullock—*The Line Confirmed*

Four years later, in *Cabana v. Bullock*,[147] the Court seemingly laid the controversy about the meaning of *Enmund* to rest. Justice White, now joined by the four dissenters in *Enmund*, held that *Enmund* "imposes a categorical rule: a person who has not in fact killed, attempted to kill, or intended that a killing take place or that lethal force be used may not be sentenced to death."[148] Under *Bullock*, contemplation or anticipation of lethal force is not enough; an accomplice must intend to use lethal force or to kill. In *Bullock*, the issue was whether the required finding had to be made by the sentencer or whether it could be made by a reviewing court.[149] Rejecting the dissenters' argument that an *Enmund* finding was an integral part of the sentencing process,[150] the majority described an *Enmund* finding as a simple corrective mechanism that easily could be applied by any court, state or federal, to ensure that an ineligible defendant would not be executed.[151]

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[146] For further discussion of the confusion caused by *Enmund*, see Note, *Imposing the Death Sentence for Felony Murder on a Non-Triggerman*, 37 STAN. L. REV. 857, 859 (1985); Note, Enmund v. Florida: *The Constitutionality of Imposing the Death Penalty Upon a Co-Felon in Felony Murder*, 32 DE PAUL L. REV. 713, 725 (1983).

[147] 474 U.S. 476 (1986).

[148] *Id.* at 386.

[149] *Id.* at 390.

[150] Justice Blackmun, with whom Justices Marshall and Brennan joined in dissent, argued that "the Eighth Amendment not only requires that the sentencer make *Enmund* findings before it decides that a defendant must die, but also requires that the *Enmund* factfinder be present at the trial, to see and hear the witnesses." *Id.* at 400 (Blackmun, J., dissenting). Justice Stevens, joined in his dissent by Justice Brennan, similarly argued that "a Mississippi jury has not found that respondent Bullock killed, attempted to kill, or intended that a killing take place or that lethal force be used. It follows . . . that a Mississippi jury has not determined that a death sentence is the only response that will satisfy the outrage of the community . . . ." *Id.* at 408 (Stevens, J., dissenting).

[151] In so holding, the Court distinguished an *Enmund* finding from both a determination

Although *Bullock*, as Justice Blackmun argued in dissent, may have relegated an *Enmund* finding to the status of a "judicial afterthought,"[152] the opinion did not represent necessarily a retreat from *Enmund*. Rather, the main effect of *Bullock* arguably was to end the confusion caused by *Enmund* and to consolidate the rule of that case. The four *Enmund* dissenters seemed to have joined the other Justices in accepting *Enmund* as a workable bright-line rule of disproportionality, based on a reasonable but broad reading of *Enmund*. A felony murder accomplice would have to kill, attempt to kill, or intend to kill or use lethal force before the death penalty could be used.[153]

F. Tison v. Arizona—*The Line Abandoned*

Any positive effect the *Bullock* decision had in insulating minimally culpable felony murder accomplices from the death penalty was short-lived. Less than a year later, in *Tison v. Arizona*,[154] Justice White provided the fifth vote for Justice O'Connor's majority opinion, which relegated the "categorical rule" of *Enmund* to little more than a case-specific finding of disproportionality.[155] The Court held that the *Enmund* "intent to kill" threshold was inapplicable in most cases involving felony murder accomplices, and only covered an accomplice who, like Enmund himself, was "the minor actor in an armed robbery, not on the scene, who neither intended to kill nor was found to have any culpable mental state."[156]

For all other accomplices, the intent to kill minimum threshold of culpability was replaced by a two-part test. Execution is allowed if the defendant was a "major participant" in the underlying felony and displayed "reckless indifference" or "reckless disregard" for human life.[157] Moreover, the two parts of the test are collapsible—major participation in some felonies will "necessarily" demonstrate reckless disregard, and in others, major participation will often provide "significant support" for that finding.[158]

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of guilt or innocence, which must be made by a jury under a specified burden of proof, and a determination of disproportionality under the eighth amendment, which involves a "case-by-case, totality-of-the-circumstances" approach. *Id.* at 384–86.

[152] *Id.* at 394 (Blackmun, J., dissenting).

[153] As to the decision's effect on federal review of an *Enmund* decision, see *infra* notes 169–72 and accompanying text.

[154] 481 U.S. 137 (1987).

[155] *Id.* at 152.

[156] *Id.* at 149–51.

[157] *Id.* at 158.

[158] *Id.* at 158 n.12.

The facts of *Tison* are extreme, and perhaps explain Justice White's abrupt abandonment of this decade-long effort to require an intent to kill as a prerequisite for the death penalty. The two brothers, Ricky and Raymond Tison, helped their father and another convicted murderer escape from the Arizona State Prison by strolling in with a large ice chest full of weapons.[159] Although no one was injured during the escape, the escapees subsequently slaughtered a family of four, including a two-year-old child, in order to steal a car.[160]

There was absolutely no evidence that either brother intended any killing to take place. Indeed, the evidence revealed the opposite—the brothers had extracted a promise from their father that no one would be hurt.[161] Therefore, the Arizona Supreme Court's strained and belated finding of an intent to kill could not withstand scrutiny.[162] Either the rule of *Enmund* had to be discarded or the

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[159] *Id.* at 139.

[160] After the escape, the Tison group experienced car problems during their flight, and decided to flag down a passing motorist in order to steal a car. The unfortunate victims were a young couple, accompanied by their 2-year-old son and 15-year-old niece. After commandeering the car, the Tison group drove the victims deeper into the desert where they were killed by repeated shotgun blasts by Gary Tison, the father, and his companion, Randy Greenwalt. The majority noted that, although the Tison brothers did not actively participate in the shootings, neither did they make any affirmative attempt to save the victims or dissuade their father from killing them. *Id.* at 139–41.

[161] The *Tison* majority accepted as true that the Tisons "did not intend to kill as the concept has been generally understood at common law" and recognized that no evidence existed that either of the Tison brothers "took any act which he desired to, or was substantially certain would, cause death." *Id.* at 150. Justice Brennan, writing for the dissent, elaborated on the lack of intent, adding additional evidence "overlooked" by the majority to make an even stronger case. While the majority noted that the brothers had made no effort to assist the victims, the dissent pointed out that, at the time of the killings, the brothers were attempting to find a jug of water for the victims. *Id.* at 166 (Brennan, J., dissenting). Justice Brennan also noted that the Tisons had "conditioned their participation [in the escape] on their father's promise that no one would get hurt." *Id.* at 167 n.7 (Brennan, J., dissenting).

[162] In affirming the Tisons' convictions, the Arizona Supreme Court first held that the Tisons "did not specifically intend that [the victims] die, that they did not plot in advance that these homicides would take place, [and] that they did not actually pull the triggers." State v. Tison, 129 Ariz. 526, 545, 633 P.2d 335, 354 (1981). This case, however, was decided prior to *Enmund*, and following *Enmund*, the Tisons applied to the Arizona Supreme Court for post-conviction relief. *Tison*, 481 U.S. at 162 (Brennan, J., dissenting). After previously holding that the Tison brothers did not intend that the killings take place, the Arizona Supreme Court now attempted to fit the murders into the box prescribed by *Enmund* by defining intent broadly enough to include the activities of the Tisons. According to the Arizona definition, "[i]ntend [sic] to kill includes the situation in which the defendant intended, contemplated, or anticipated that lethal force would or might be used or that life would or might be taken in accomplishing the underlying felony." State v. Tison, 142 Ariz. 454, 456, 690 P.2d 755, 757 (1984). Justice O'Connor dismissed this attempted broadening of the definition of intent as "little more than a restatement of the felony-murder rule itself."

Tison brothers had to be given the protection of the rule. However ambiguous *Enmund* might have been, *Bullock* left no doubt that the Court indeed had created a categorical rule to apply to all felony murder accomplices.[163] For Justice White, Justice O'Connor's warning in *Enmund* that the intent to kill rule was too "crudely crafted" must have borne fruit.[164]

The majority's decision to abandon the intent to kill minimum threshold drew a bitter and eloquent dissent from Justice Brennan. He quarreled with the majority's treatment of precedent. Using Justice White's own words, he argued the appropriateness of the intent to kill standard,[165] and he chastised the majority for its dicta indicating belief that the Tison brothers met the new standard.[166]

The new rule of *Tison* on its face, however, seems a modest retreat from the standard suggested in *Enmund* and recognized in *Bullock*. As *Enmund* set the bright line at one component of common law malice, intent to kill, the new standard of *Tison* seems to approximate another mental state traditionally encompassed in the notion of malice—extreme or "depraved heart" recklessness.[167]

Tison, 481 U.S. at 151. Justice Brennan also criticized the lower court's "misguided attempt to preserve its earlier judgment by equating intent with foreseeable harm." *Id.* at 163 (Brennan, J., dissenting). He correctly pointed out that, under the proposed standard, "*any* participant in a violent felony during which a killing occurred, including Enmund, would be liable for the death penalty." *Id.*

[163] *Tison*, 481 U.S. at 173–74.

[164] Enmund v. Florida, 458 U.S. 782, 825 (1982) (O'Connor, J., dissenting).

[165] Justice Brennan quoted Justice White's opinion in Lockett v. Ohio, 438 U.S. 586, 626–28 (1978):

> [S]ociety has made a judgment, which has deep roots in the history of criminal law . . . distinguishing at least for purpose of the imposition of the death penalty between the culpability of those who acted with and those who acted without a purpose to destroy life.

Tison, 481 U.S. at 172 (Brennan, J., dissenting). For Justice Brennan's full argument on the intent-to-kill standard, see *id.* at 168–74.

[166] *Id.* at 164–67.

[167] Depraved heart or depraved mind murder constitutes the basis for second-degree murder in a number of jurisdictions. States have defined the term in a variety of ways. *See, e.g.*, Napier v. State, 357 So. 2d 1001, 1008 (Ala. Crim. App. 1977), *rev'd*, 357 So. 2d 1011 (Ala. 1978) ("For purpose of depraved heart murder statute, a 'depraved mind' is one revealing an extreme indifference to human life."); Marasa v. State, 394 So. 2d 544, 545 (Fla. Dist. Ct. App. 1981) (describing depraved mind for second degree murder as "an act which a person of ordinary judgment would know is reasonably certain to kill or do serious bodily injury to another, [and] is done from ill-will, hatred, spite, or an evil intent, and is of a nature that the act itself indicates an indifference to human life"), *petition denied*, 402 So. 2d 613 (Fla. 1981); People v. Fenner, 61 N.Y.2d 971, 973, 463 N.E.2d 617, 618, 475 N.Y.S.2d 276, 277 (1984) ("In second-degree murder, 'depraved indifference to human life' required that jury find defendant's conduct, beyond being reckless, so wanton, so deficient in moral sense of concern, so devoid of regard of life or lives of others, and so blameworthy as to

In several respects, Justice O'Connor's approach to setting a new minimum culpability threshold also is strikingly similar to the approach contained in the Model Penal Code. Under the Code, which does not divide murder into degrees, defendants are guilty of murder, and are thus death-eligible, not only if they kill purposely or knowingly, but also if they do so "recklessly under circumstances manifesting extreme indifference to the value of human life."[168] Justice O'Connor also followed the Code in allowing participation in a concurrent felony to be used to show the requisite recklessness.[169]

A problem arises with the *Tison* decision, however, one which was not mentioned by Justice Brennan in his dissent. It does not lie in the Court's decision to use one, rather than the other, component of common law malice as the *mens rea* threshold for a felony murder accomplice. Nor does it lie in the majority's obvious belief that the brothers' culpability was sufficient to permit capital punishment to be imposed. Rather, the real import of the decision becomes obvious only upon a close look at the nature of the *Tison* standard and its practical impact.

Because of the vagueness of the reckless indifference standard and because a determination of reckless indifference is fundamentally different from a determination of intent to kill, the *Tison* decision inevitably leads to two results. It minimizes and threatens to virtually eliminate federal review of a threshold culpability finding—a matter of enormous import in a capital case. It also signals the effective end of the Court's attempt to control the excesses of the felony murder rule in the capital punishment context by using a bright-line rule of disproportionality.

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warrant the same criminal liability as that which the law imposes upon a person who intentionally causes the death of another."); Jones v. State, 70 Wis. 2d 41, 49, 233 N.W.2d 430, 435 (1975) ("Depraved mind as required for conviction of second degree murder is one which is indifferent to the life of others."); State v. Weso, 60 Wis. 2d 404, 411, 210 N.W.2d 442, 445 (1973) ("More than a high degree of negligence or recklessness must exist, and the mind must not only disregard the safety of another but be devoid of regard for the life of another."). *See generally* W. LAFAVE & A. SCOTT, CRIMINAL LAW § 7.4 (1986); R. PERKINS, CRIMINAL LAW 73–75 (3d ed. 1982).

[168] MODEL PENAL CODE § 210.2(1)(b) (1985) (criminal homicide constitutes murder when "it is committed recklessly under circumstances manifesting extreme indifference to the value of human life").

[169] MODEL PENAL CODE § 210.2(1)(b) (1985) (reckless indifference to human life "presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape").

VI. The Aftermath of *Tison*

A. Tison, Bullock, *and Federal Review of a* Tison *Finding*

The diffuse and inherently judgmental nature of a *Tison* reckless indifference finding makes federal review of such a finding by a state court problematic under any circumstances. If the Court expands its holding in *Cabana v. Bullock* to apply *in toto* to a holding under *Tison,* federal review in this area is probably a dead letter. Because of the inherent difference between an *Enmund* determination and a *Tison* determination, however, *Bullock*, to the extent that it limits federal review of a state court decision, should not be held applicable to a *Tison* finding that defendants may be executed because of their reckless indifference to human life.

A court determining whether a defendant acted with reckless indifference to human life is undertaking a completely different task from a court determining intent to kill. Instead of deciding whether a simple historical fact is present, a court looking at reckless indifference to human life is essentially expressing a moral judgment, a judgment of the culpability of, and not merely the purpose underlying, a defendant's acts. As the Court has acknowledged elsewhere, this process reflects that the concept of reckless indifference is not a fact but a highly subjective evaluative judgment with no common core of meaning.[170]

The nature of the reckless indifference standard is not altered by the second, or alternative, part of the *Tison* standard, which requires that the defendant be a "major" participant in the felony.[171] A defendant is a "major" participant if he or she is not a "minor" participant. Almost any participant can be so labelled. Major and minor just describe two indefinite areas on a continuum of participation, somewhere between a sole participant and a non-participant.

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[170] The Court has acknowledged the elusive nature of the concept of reckless disregard, or reckless indifference, in its libel cases. For instance, in *St. Amant. v. Thompson*, Justice White, writing for the Court, wrote that reckless disregard for the truth in a libel case "cannot be fully encompassed in one infallible definition. Inevitably its outer limits will be marked out through case-by-case adjudication." 390 U.S. 727, 730 (1968). In *Bose Corp. v. Consumers Union of U.S., Inc.*, the majority relied in part on this description of the reckless disregard standard from *St. Amant* to support its conclusion that a finding of actual malice in a libel case should not be subject to the restrictive standard of review contained in Federal Rule of Civil Procedure 52(a). 466 U.S. 485, 503 (1984). Further, Justice White, in his separate opinion in *Bose*, distinguished between actual knowledge, which he described as a question of historical fact, and reckless disregard, which, in his opinion, cannot be so described. *Id.* at 515.

[171] *See supra* note 149 and accompanying text.

Major is just a comparative term, and even Earl Enmund might fit into this category. Despite his absence from the scene of the killing, the trial court in his case found that he was not a minor actor because he helped plan the robbery and drove the getaway car.[172]

In *Cabana v. Bullock*, the Court, without dissent, held that a finding of intent to kill under *Enmund* was a factual finding.[173] The primary effect of this holding was to limit federal review of an *Enmund* finding because 28 U.S.C. Section 2254(d) provides a presumption of correctness in a federal habeas corpus court to any factual finding made by a state court.[174] Accordingly, as Justice

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[172] Enmund v. Florida, 458 U.S. 782, 786 n.2 (1982).

[173] 474 U.S. 376, 387 (1986) (describing the "requisite factual finding" under *Enmund*); *see also id.* at 396 (Blackmun, J., dissenting) (*Enmund* finding a "constitutionally required factual predicate for the valid imposition of the death penalty").

[174] 28 U.S.C. § 2254(d) (1982) states:

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit —
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> (1) that the merits of the factual dispute were not resolved in the State court hearing;
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> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
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> (3) that the material facts were not adequately developed at the State court hearing;
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> (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
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> (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
>
> (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
>
> (7) that the applicant was otherwise denied due process of law in the State court proceeding;
>
> (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:
>
> And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the

White stated in *Bullock*, a defendant challenging an adverse state *Enmund* finding has to bear a "heavy burden" of showing that the finding was not fairly supported by the record or that the state procedures leading to the finding were inadequate.[175]

As in *Bullock*, the extent to which a federal court will review a finding by a lower federal court or a state court historically has been governed by the description given to the finding to be reviewed. If a finding is considered a finding of fact, then the review is circumscribed. If the issue is deemed a legal question or a mixed question of fact and law, then far more extensive review is permitted.[176] Section 2254 embodies this distinction.

The fact/law distinction, however, often has proved troubling. In recent years, the Court has moved away somewhat from sole reliance on this dichotomy, acknowledging that a decision concerning the scope of review undertaken by a federal court is governed as much by policy as it is by doctrine.[177] When the issue under review is not clearly a simple historical fact or a clear legal question, the Court now analyzes the scope of review issue as one which depends in part on whether, "as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question."[178]

The *Bullock* conclusion regarding the nature of an *Enmund* finding seems correct, or at least defensible. By giving a definite meaning to the *Enmund* rule, the *Bullock* Court provided a basis for its holding that intent to kill is a simple historical fact. Intent *is* a

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provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, *the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous* (emphasis added).

[175] 474 U.S. at 388 (citing Sumner v. Mata, 449 U.S. 539 (1981) and 28 U.S.C. § 2254 (d) (1982)).

[176] *Compare* Sumner v. Mata, 449 U.S. 539, 552 (1981) (federal court of appeals failed to give presumption of correctness to underlying factual findings concerning identification procedures made by state court) *with* Neil v. Biggers, 409 U.S. 188, 201 (1972) (conclusion as to suggestivity of pretrial identification procedures not a question of fact). The Court first set out the standards for federal habeas review of state court findings in Townsend v. Sain, 372 U.S. 293 (1963), and the Court's holding was later incorporated into 28 U.S.C. § 2254. For a lengthy discussion of the fact/law distinction, and the problems inherent in this distinction, see Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229 (1985).

[177] *See* Miller v. Fenton, 474 U.S. 104, 113–14 (1985) (citing Monaghan, *supra* note 176). In terms of fact allocation, "the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question." *Id.* at 114.

[178] *Id.* at 114.

fact, albeit often a difficult one to determine, and thus section 2254 would seem to apply in full force.[179]

The allocation of resources achieved by the holding in *Bullock* also appears justified. The Court's decision to leave the primary *Enmund* decision with the state courts appears to finely balance the interests of the defendant and the state. The state courts are accorded a degree of deference, allowed to determine credibility of witnesses, and resolve factual disputes. But the federal courts easily can review the record to judge the correctness of the ultimate decision. The *Tison* opinion itself demonstrates as much. All of the Justices were able to agree that the Arizona Supreme Court's intent to kill finding was unsupported by the record under any reasonable interpretation of the phrase.[180]

In contrast, as a matter of common sense, a *Tison* reckless indifference finding is plainly not a factual finding. As a moral evaluative judgment, it is either a legal finding or at least a mixed finding of fact and law, which "requires the application of legal principles to the historical facts of [the] case."[181] The Justices already have remarked upon the unsuitability of describing something as vague as reckless disregard as a factual finding in libel cases.[182] There is no reason to presume that reckless indifference to human life in a capital case is any more suited to this function.

The modern test yields the same result. Unless a federal court is allowed some freedom to make a *de novo* reckless indifference determination, even giving full credence to state court determinations of subsidiary historical facts, there will be no effective federal

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[179] The *Enmund/Bullock* rule fits well into the definition provided by Professor Monaghan for identifying historical facts:

> Fact identification . . . is a case-specific inquiry into *what happened here*. It is designed to yield only assertions that can be made without *significantly* implicating the governing legal principles. Such assertions, for example, generally respond to inquiries about who, when, what, and where—inquiries that can be made "by a person who is ignorant of the applicable law."

Monaghan, *supra* note 176, at 235.

Treating intent to kill as a factual finding also is compatible with the Court's analysis in *Miller*. Analytically, Justice O'Connor stated "an issue [that] involves an inquiry into state of mind is not at all inconsistent with treating it as a question of fact." *Miller*, 474 U.S. at 113.

[180] See *supra* note 161 for a discussion of the majority's repudiation of the Arizona Supreme Court's finding. The dissent likewise agreed that intent could not be equated with foreseeable harm, as the Arizona Supreme Court had suggested. *Fenton*, 474 U.S. at 163 (Brennan, J., dissenting).

[181] Cuyler v. Sullivan, 446 U.S. 335, 342 (1980); *see also* Townsend v. Sain, 372 U.S. 293, 309 n.6 (1963) (mixed questions of fact and law "require the application of a legal standard to the historical-fact determinations").

[182] *See supra* note 170.

review in this area. Because reckless indifference arguably is present in every felony murder, some support in the record always will exist for a state court finding of reckless indifference.

It is one thing for a court, such as the Supreme Court in *Tison*, to search the record to see if any evidence exists to support something that has a core meaning, such as intent. It is quite another to do the same thing for something as value-laden and nebulous as reckless indifference to human life. Therefore, the choice is between leaving the *Tison* determination solely to the state courts or allowing the federal courts to participate by granting them a broader scope of review than permitted by section 2254(d). As a matter of judicial allocation, the latter is the only logical solution.

In capital cases, adequate federal review and enforcement is all-important. Although there well may be a debate about the willingness and competence of state judges to enforce other federal norms, constitutional and otherwise, death is unquestionably different in this respect. Of all cases, capital trials most often inflame community passions. A state judge, living in the midst of the outrage caused by the crime, commonly subject to a future election, must be aware of the cost of ordering a new trial or sentencing for a convicted murderer. Recent history teaches us that elected judges deemed soft on capital punishment can lose their jobs.[183]

In contrast, Article III was included in the Constitution to address the need for federal judges to be insulated from community outrage.[184] Immune from political pressures and tenured for life,

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[183] Three justices were voted out of the California Supreme Court in 1986 because of their records on the death penalty. The Los Angeles Times reported, "[a]fter nine years in the job, [Chief Justice Rose] Bird fell victim to a multimillion dollar campaign that focused on her long record of voting to overturn death sentences. Bird's 'box score', as it became known, of 61 reversal votes in 61 capital cases became a constant refrain of the campaign against her." Clifford, *Voters Repudiate 3 of Court's Liberal Justices*, L.A. Times, Nov. 5, 1986, § 1, at 8, col. 4. In addition to Chief Justice Bird, Associate Justices Reynoso and Grodin also were targeted for their records of 46 reversals in 47 cases and 40 reversals in 45 cases, respectively. *Id.* The 10-million-dollar campaign appealed to the public's emotions by advertisements including the mother of a 12-year-old murdered girl. *Id.*, § 1, at 24, col. 1. These are the first justices voted out since the change in the California judicial election system in 1934. *Id.*, § 1, at 24, col. 2.

[184] Alexander Hamilton expressed his views in *The Federalist* No. 81:

> But ought not a more direct and explicit provision to have been made in favour of the State courts? There are, in my opinion, substantial reasons against such a provision: The most discerning cannot foresee how far the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes; whilst every man may discover that courts constituted like those be improper channels of the judicial authority of the union. State judges, holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws.

federal judges have served as the primary guarantors of the eighth amendment rights granted to capital defendants by the Supreme Court.[185] Since 1976, the federal courts have reversed an inordinately large number of capital cases.[186] Capital cases involving even the most egregious of constitutional rights too often have passed untouched through the various stages of state review, only to be reversed years later in a federal habeas corpus court.[187] Although there are state reversals of capital cases, one can only wonder how many reversals there would be without the specter of further federal habeas review looming in the background. Federal habeas review, therefore, unquestionably is necessary in order to ensure that state courts follow the dictates of the constitution.[188] Finally, the impor-

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The Federalist No. 81, at 415 (A. Hamilton) (M. Beloff 2d ed. 1987). As Professor James Liebman states: "[C]apital cases present the situation in which the clash in the state courts between parochial interests and emotions and national constitutional law and liberties is most likely to favor the former and demean the latter . . . ."

1 J. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 2.2, at 22 (1988).

[185] "[E]xperience suggests that federal courts stand in a better position to adjudicate constitutional rights." Coleman v. McCormick, 874 F.2d 1280, 1295 n.8 (9th Cir.) (Reinhardt, J., concurring), *cert. denied*, 110 S. Ct. 349 (1989). The institutional differences which underlie the federal court's primary role in this area are discussed at length in Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1118–30 (1977). Professor Neuborne notes that the federal judges provide a more effective forum for adjudicating constitutional rights because of their ability to resist majoritarian pressures, their superior technical competence in this field, and certain psychological factors that make them more receptive to constitutional claims. *Id.* at 1120–28.

[186] *See, e.g.*, Barefoot v. Estelle, 463 U.S. 880, 915 (1983) (Marshall, J., dissenting) (since 1976, capital defendant prevailed in 23 out of 34 federal habeas cases, 15 out of 21 in the Fifth Circuit Court of Appeals); Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 AM. U.L. REV. 513, 521 (1988) (between 1976 and 1983, favorable decisions for capital habeas petitioners in 73.2% of the cases, as opposed to a 6.5% success rate for non-capital petitioners); Amsterdam, *In Favorem Mortis*, 14 HUM. RTS. 14, 51 (1987) (noting obvious fact that in every case in which the habeas petitioner prevails state courts had already rejected the claims).

[187] *See, e.g.*, Coleman v. McCormick, 874 F.2d 1280, 1289 (9th Cir.) (death penalty reversed when defendant had no way of knowing that evidence from the trial could be considered in the sentencing phase under a new death penalty statute not in effect at the time of original trial), *cert. denied*, 110 S. Ct. 349 (1989); McDowell v. Dixon, 858 F.2d 945, 951 (4th Cir. 1988) (black defendant's capital conviction reversed for failure of prosecution to disclose that sole eyewitness had told police that perpetrator was white), *cert. denied*, 109 S. Ct. 1172 (1989).

[188] *See, e.g.*, Butler v. McKellar, 110 S. Ct. 1212, 1217 (1990) (primary function of federal habeas review is to deter state courts from departing from constitutional norms); Saffle v. Parks, 110 S. Ct. 1257, 1260 (1990) (same). As Justice Brennan has noted, "an awareness by state tribunals that the procedural barrier to state review would not be deemed necessarily a barrier to federal review, would provide an incentive for state courts to reach serious constitutional claims and vindicate them in proper cases." Brennan, *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423, 442 (1961).

tance of federal review is heightened even further when the claim involves a disproportionality challenge. A finding of ineligibility under a categorical rule is a definitive finding that the death penalty cannot be imposed on the defendant for the particular crime. This result means that a judge who makes this finding will have to face far more outrage than if the only result of a ruling favorable to the defendant is a resentencing trial with the real possibility of a new death penalty in the future.

In the *Bose* case, the Court held that a finding whether a libel defendant acted with or without reckless disregard for the truth is not a factual finding entitled to the deferential "clearly erroneous" standard of review of Federal Rule of Civil Procedure 52(a).[189] Similarly, the Court has held that a finding concerning the voluntariness of a confession of a criminal defendant is not a finding of fact subject to the strictures of section 2254(d).[190] In light of the imperative for effective federal review of a capital case, a state court finding that a defendant acted with reckless indifference to human life should be treated the same way. Each of these decisions has a "uniquely legal dimension."[191] All of them are essentially evaluative judgments, and depend upon the evaluator's consideration of a plethora of legal, moral, and factual considerations. In all of these situations, the ultimate decision requires as much a determination of legal principles as a determination of fact. A federal court is in a better position than a state court to make the decision in each of these situations.[192]

In his study of federal habeas corpus actions filed in the District of Massachusetts from 1970 through 1972, Professor Shapiro found that:

> [I]n sum, there are a substantial number of cases—difficult to count because they are not often disclosed by the face of the record—where habeas corpus proves a useful remedy even though the matter prayed for is not granted. For the most part, these are cases in which state processes have for one reason or another been derailed and federal assistance has been helpful in getting them back on the track—cases in which even the most vigorous critics agree that habeas corpus has an important function to perform.

Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 HARV. L. REV. 321, 342 (1973).

[189] Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 514 (1984).

[190] Miller v. Fenton, 474 U.S. 104, 115 (1985).

[191] *Id.* at 116.

[192] In determining whether the voluntariness of a confession should be considered a factual or a legal conclusion, the Court in *Fenton* addressed both the "uniquely legal dimension" of a confession, *id.* at 116, and the role of independent federal review in protecting the defendant's rights, *id.* at 118. The Court reasoned that "[a]t least in those instances in which Congress has not spoken and in which the issue falls somewhere between a pristine legal standard and a simple historical fact, the fact/law distinction at times has turned on a

A federal court, then, should be able to make an independent determination of whether a felony murder accomplice acted with reckless indifference to human life. The *Tison* rule will offer even a modicum of protection to felony murder accomplices only if the federal court is so allowed.

B. *The Demise of the Bright-Line Rule*

The Supreme Court creates a bright-line rule when it confronts a problem serious and pervasive enough to require correction in a relatively large number of cases. The best way to solve this problem is to create a firm rule to govern the cases arising under the rule.[193] For a bright-line rule to work, however, there must be a clear demarcation that puts some actions or individuals on one side of the rule, and others on the other side.[194] As long as this demarcation exists, the rule may accomplish its primary purposes. It solves the identified problem by drawing a clear line of distinction; it provides guidance and direction to those who must apply or enforce the rule; and it eliminates the need for case-by-case, totality of the circumstances determinations.[195]

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determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the question." *Id.* at 114. This does not mean that all facts in the record relating to the confession must have independent review. Determinations such as the resolution of conflicting testimony by the jury will be preserved assuming it is "fairly supported in the record." *Id.* at 117. "But once such underlying factual issues have been resolved, and the moment comes for determining whether, under the totality of the circumstances, the confession was obtained in a manner consistent with the Constitution, the state-court judge is not in an appreciably better position than the federal habeas court to make that determination." *Id.* The issue is the same in the determination of reckless indifference to human life. There may be a presumption of correctness of the findings of historical facts about the crime, but the determination of whether, in totality, they rise to the level of reckless indifference can and should receive independent review by federal habeas courts.

[193] *See generally* LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith,"* 43 U. PITT. L. REV. 307, 320–33 (1982). For further discussion of the Supreme Court's use of bright line rules and the policies underlying this use, see Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227 (1984); Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974); LaFave, *"Case-by-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma*, 1974 SUP. CT. REV. 127.

[194] As Professor LaFave states, a bright line rule must "have clear and certain boundaries." LaFave, *supra* note 193, at 325.

[195] "The function of such rules is to remove the uncertainty from fourth amendment law for the police and the courts. Rather than leaving permissible search and seizure practices dependent on case-by-case evaluation of the justification for the procedure employed, hard and fast rules are designed to make the fourth amendment clear and consistent for those who apply it." Ashdown, *Good Faith, the Exclusionary Remedy, and Rule-Oriented Adjudication in*

The *Enmund/Bullock* rule served this function, at least for the short time it existed. As Justice O'Connor acknowledged in *Tison*, the standard of intent to kill has a recognizable core of meaning.[196] That is, one acts in this mental state when one intends to cause the death of another. A problem may arise determining whether or not the evidence in a given case is sufficient to meet the standard, but there is no uncertainty in determining the standard. Accomplices who act with a purpose to kill fall on one side of the standard, while those who lack this purpose fall on the other side. As Justice White explained in *Bullock*, a court applying this rule simply had to make a simple factual determination.

The *Tison* reckless indifference standard is anything but a bright line. There is neither a clear line of demarcation nor any real guidance. Whether any felony murderer comes under the rule depends on the decision maker's subjective moral evaluation of the defendant's acts. Because of its indefiniteness, the *Tison* standard rationally can be held to apply to every felony murder accomplice. In every felony murder case, the defendant has agreed to commit a dangerous felony and, as a result, someone has ended up dead. This action certainly approximates the idea of reckless indifference.[197] After *Tison*, even the accomplice extracting promises from the principal felons that there would be no killings would not shield an accomplice from a reckless indifference finding.[198]

The potential overinclusiveness arising from the vagueness of the reckless indifference standard raises an interesting parallel with the "especially heinous" narrowing device that has so troubled the Court. The Court twice has struck down a death sentence based on

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the Criminal Process, 24 WM. & MARY L. REV. 335, 346 (1983); *see also* LaFave, *supra* note 193, at 325 (bright line rule must make case-by-case adjudication unnecessary).

[196] Tison v. Arizona, 481 U.S. 137, 150 (1987). O'Connor uses the definition offered by W. LAFAVE & A. SCOTT, CRIMINAL LAW § 28 (1972): "one intends certain consequences when he desires that his acts cause those consequences or knows that those consequences are substantially certain to result from his acts."

[197] This reckless indifference is especially so in regard to the felonies such as robbery, arson, kidnapping and rape, which most commonly appear in modern first-degree felony murder statutes. *See supra* note 64. These felonies are included in the felony murder statutes precisely because they are inherently dangerous and more likely to result in death. For other criticisms of the overinclusiveness of the *Tison* standard, see, *e.g.*, Note, *Reckless Indifference as Intent to Kill: The Disproportionality of Punishment After* Tison v. Arizona, 20 CONN. L. REV. 723, 751, 756, 757 (1988); Note, *The Supreme Court and* Tison v. Arizona: *A Capital Example of Judicial Unsoundness*, 29 B.C.L. REV. 969, 1006 (1988). *See also* Comment, Tison v. Arizona: *No Intent Required for Death Penalty of Accomplice in Felony Murder*, 10 CRIM. JUST. J. 167 (1987) (criticizing standard).

[198] *See supra* note 154 and accompanying text.

this narrowing device because of the absence of a limiting principle either inherent in its words or developed by the state appellate court.[199] The problem with such a narrowing device is that every first degree murder arguably is heinous, atrocious, or cruel. The absence of any core of meaning makes the device ineffectual to carry out its constitutional function of narrowing the class of death eligible defendants.[200] Similarly, the same lack of an identifiable core inherent in the *Tison* rule renders it incapable of carrying out any constitutionally meaningful delineation between classes of felony murder accomplices because every felony murder accomplice arguably is recklessly indifferent.

The *Tison* rule therefore serves as more of an exhortation than a true categorical rule. It tells the states that some felony murder accomplices should not be executed, but provides little meaningful guidance in identifying these accomplices. Like the Arizona Supreme Court's strained reading of the intent to kill standard in *Tison*,[201] the reckless indifference standard of *Tison* is nothing more than a redressing of the felony murder rule in slightly different clothing.

Disproportionality review under the eighth amendment, however, still has a place in limiting the death penalty in felony murder cases. The Court's retreat from a bright-line rule does not eliminate the concerns that initially led to the creation of the rule. The same overinclusiveness and potential disproportionality inherent in the felony murder rule, which first led the Court to create the *Enmund* categorical rule, still remains. Now, after *Tison*, courts will have to address these concerns in capital cases.

VII. Case-Specific Disproportionality Review for Felony Murder Accomplices

Consider a death sentence imposed on a defendant who just misses fitting into all of the preclusive disproportionality categories

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[199] Maynard v. Cartwright, 486 U.S. 356, 363–64 (1988) (holding Oklahoma court's application of "especially heinous, atrocious or cruel" aggravating circumstance unconstitutional); Godfrey v. Georgia, 446 U.S. 420, 428–29 (1980) (overruling death sentence based on Georgia's version of the "especially heinous" aggravating circumstance). For a pre-*Cartwright* discussion of the problems caused by the "especially heinous" aggravating circumstance, see Rosen, *supra* note 58.

[200] *See Cartwright*, 108 S. Ct. at 1859 (acknowledging that every capital murder could be considered especially heinous); *Georgia*, 446 U.S. at 429 (same).

[201] Tison v. Arizona, 481 U.S. 137, 151 (1987) (Arizona Supreme Court's attempt to expand *Enmund*'s intent to kill requirement to facts of *Tison* amount to "little more than a restatement of the felony murder rule itself").

recognized by the Court. The defendant is 16 years old. He is mentally retarded but not insane, and he is convicted of being an accomplice to an accidental felony murder. *Coker v. Georgia*[202] offers no protection because a death has occurred. *Stanford v. Kentucky*[203] leaves him death-eligible despite his youth. *Penry v. Lynaugh*[204] refused to erect a categorical rule based on mental retardation. The defendant always can be too involved in the felony to be shielded from the death penalty by *Tison*.

Is this defendant among those "worst" murderers for whom the Court wishes to reserve the death penalty? Consistent with the concerns expressed in *Furman* and subsequent cases, can he or she be executed while thousands of deliberate cold-blooded murderers are allowed to live?

The only sensible answer is a negative one. A death sentence in these circumstances would be grossly disproportionate to the individual culpability and blameworthiness of this defendant. This result can only be reached, however, if a court considers the disproportionality of the death sentence in light of the totality of the circumstances surrounding the case.

Since 1976, the Supreme Court, preoccupied with experimenting with the fashioning of various bright-line disproportionality rules, never has openly conducted a case-specific disproportionality review in a capital case. The Court has neither explained why it has thus limited its disproportionality review in capital cases to the categorical method nor why it has never used this approach in non-capital cases.

The reason for this differentiation between approaches in capital and non-capital cases is discernible from the opinions in *Solem v. Helm*.[205] Two strains unite the several opinions in *Helm*. One strain is that disproportionality is a special concern in capital cases.[206] The other strain is a desire to limit the practice of disproportionality review. In so doing, courts will not have to undertake routinely this

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[202] *See supra* note 113 and accompanying text.

[203] 109 S. Ct. 2969, 2977–79 (1989) (refusing to establish categorical rule prohibiting death penalty for defendant 16 or 17 years old at time of offense).

[204] 109 S. Ct. 2934, 2958 (1989) (refusing to establish categorical rule of preclusion for mentally retarded defendant).

[205] 463 U.S. 277 (1983). For a discussion of *Helm*, see *supra* notes 89–92 and accompanying text.

[206] *See id.* at 289 (noting uniqueness of capital cases and willingness of Court to consider disproportionality in capital cases), and at 306 (Burger, C.J., dissenting) (citing Rummel v. Estelle, 445 U.S. 263, 271 (1980), for proposition that disproportionality is a "unique" concern in capital cases).

arduous task and such review will not turn into a more generalized appellate review of sentences.[207]

The categorical rules the Court has developed in capital cases minimize the inherent contradictions between these two concerns. The categorical rules give special protections to broad groups of potential capital defendants and, at the same time, minimize and simplify the burdens on the courts. In most cases, it is not a difficult task at either the trial or appellate level to determine whether a defendant falls on one side or the other of the bright line, i.e., whether the defendant was under 16 at the time of the crime or whether someone died as a result of the crime. The real disproportionality inquiry is the initial decision about whether to adopt a rule. This decision already will have been accomplished by the time most cases arise.[208]

The categorical rules, however, are only tools to help the courts prevent disproportionality; they are not ends in themselves. Categorical rules are broad and inflexible, and no matter how many categorical rules the Court decides to adopt, some death penalties would still be grossly disproportionate and outside the reach of the rules.[209] Because a defendant does not fall into one of the rigid categories of defendants for whom the death penalty is proscribed does not mean either that the death sentence is proportionate or that the court has reviewed the defendant's case for disproportionality. It merely means that the death sentence imposed in the particular case is not disproportionate for the particular reason embodied in the particular rule.

Even a death penalty imposed for a deliberated and premeditated murder may be grossly disproportionate under the eighth amendment. After all, in *Gregg v. Georgia*, Justice Stewart did not hold that any death sentence imposed for deliberate murder is *ipso*

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[207] *Id.* at 290 n.16 (noting concern with appellate review of sentences and noting "substantial deference" that must be given to legislative judgments as to the appropriate sentence), and at 315 (Burger, C.J., dissenting) (warning that the majority decision will "flood the appellate courts with cases").

[208] As noted at *supra* note 145, Justice White relied on this difference in the types of review required in his decision in *Bullock*. *See* Cabana v. Bullock, 474 U.S. 376, 386 (1986).

[209] This proposition only recognizes the obvious fact that categorical rules may sometimes provide less protection and cause more administrative problems than the alternative case-by-case approach. Professor LaFave states that one question the Court must always ask before adopting a categorical rule is whether it is truly a workable approach to solving a particular problem. LaFave, *supra* note 193, at 326. *See also* Alschuler, *supra* note 193, at 287–88 (suggesting that the Court has made too much use of bright lines in the fourth amendment area).

facto proportionate, only that a death penalty is not *invariably* disproportionate to the crime in that situation.[210] For example, some defendants commit euthanasia in order to end the suffering of a loved one. These defendants can be, and sometimes are, convicted of first-degree premeditated and deliberated murder.[211] Given the wide variety of aggravating circumstances used by the states, these types of murderers are not ineligible automatically for the death penalty.[212]

These defendants would not be protected necessarily by any of the present categorical disproportionality rules, nor is an appropriate bright line to cover this situation easy to conceive. A death sentence imposed on a mercy-killer obviously is not proportionate just because the Supreme Court has not provided a categorical rule to cover this situation. This situation requires what occurs in appropriate non-capital cases—a true disproportionality inquiry, based on all of the circumstances of the case.

If the Supreme Court had envisaged solving the disproportionality problem in capital cases at one time solely by using categorical rules of preclusion, it obviously has given up this hope in the past several years. The Court's retreat from the *Enmund* rule in *Tison* does not stand alone but should be read together with the Court's refusal to erect a categorical barrier to the execution of the mentally retarded in *Penry* and its decision to allow the execution of some juveniles in *Stanford*. Like *Penry* and *Stanford*, *Tison* is not a decision to create a new categorical rule but a decision to reject the adoption of, or, in the case of *Tison*, the continuation of, a specific rule.

Neither *Stanford* nor *Penry* hold that a death sentence for a 16-year-old, or mentally retarded, defendant is necessarily proportionate under the eighth amendment. In both cases, the Court carefully phrased its denial of the rule sought by holding that the factor, mental retardation or age, was not *alone* sufficient to render the death penalty disproportionate.[213]

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[210] Gregg v. Georgia, 428 U.S. 153, 186 (1976).

[211] *See, e.g.*, Gilbert v. State, 487 So. 2d 1185 (Fla. 1986); State v. Forrest, 321 N.C. 186, 362 S.E.2d 252 (1987); and *see generally* D. HUMPHREY & A. WICKETT, THE RIGHT TO DIE (1986); Kamisar, *Some Non-Religious Views Against Proposed "Mercy-Killing" Legislation*, 42 MINN. L. REV. 969 (1958); Note, *State v. Forrest: Mercy Killing and Malice In North Carolina*, 66 N.C.L. REV. 1160, 1168–70 (1988).

[212] *See supra* note 48 and accompanying text.

[213] In *Penry*, Justice O'Connor reasoned that those who are mentally retarded are not a homogenous group, but rather, they can vary greatly in abilities and understanding. Thus, she concluded:

> I cannot conclude that all mentally retarded people of Penry's ability—by virtue of their mental retardation *alone*, and apart from any individualized consider-

Tison should be read the same way. Simply because a court can say that a defendant was recklessly indifferent does not mean that a death penalty is not grossly disproportionate under the eighth amendment. Only by considering all of the factors in a case can a court make this decision.

In the felony murder area, this type of case-specific review might be largely redundant, at least for accomplices, if the *Enmund* categorical rule was still the law. Although a rare case might raise this issue, it is difficult to conceive of a disproportionality problem in a case where the defendant intentionally commits a dangerous felony *and* intends that a life be taken during this felony. The broad rule of *Enmund*, however, no longer exists as a rule of law. *Tison* now governs and, particularly if the *Bullock* limitation of federal review is held to apply, it does little to obviate the need for a case-specific disproportionality review for felony murder accomplices.

This case-specific disproportionality review would differ only slightly from the procedure previously used by the Supreme Court to determine the appropriateness of a requested categorical rule. Although the court would have to examine a broader range of circumstances than if a categorical rule were being invoked, a court responding to such a challenge would, like the Supreme Court has in the past, have to make its own determination of the issue after seeking guidance from objective factors.[214]

Perhaps the greatest change in case-specific disproportionality review would have to come in the court's consideration of legislative

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> ation of their personal responsibility—inevitably lack the cognitive, volitional, and moral capacity to act with the degree of culpability associated with the death penalty. Mentally retarded persons are individuals whose abilities and experiences can vary greatly . . . . [W]e cannot conclude today that the Eighth Amendment precludes the execution of any mentally retarded person of Penry's ability simply by virtue of their mental retardation *alone*.

109 S. Ct. 2934, 2957–58 (1989) (emphasis added). The *Penry* Court did not hold that a death penalty imposed on Mr. Penry, or any other retarded person, is not grossly disproportionate under the totality of the circumstances.

Similarly, in considering the death penalty for a 16 year old, the Supreme Court held that before a rule could be adopted making all juveniles ineligible for the death penalty, it must be shown, "not that 17 or 18 is the age at which most persons, or even almost all persons, achieve sufficient maturity to be held fully responsible for murder; but that 17 or 18 is the age before which *no one* can reasonably be held fully responsible." Stanford v. Kentucky, 109 S. Ct. 2969, 2978–79 (1989). Thus, for both youthful defendants and mentally retarded persons, the Court has left open the possibility that the sentence can be found grossly disproportionate under a totality of the circumstances approach.

[214] For a discussion of how the Court conducts a review for disproportionality, see *supra* notes 105–09 and accompanying text.

enactments. Although decisions in other cases can provide some guidance in a case-specific challenge (assuming that there are enough similar cases), this guidance is not available with legislative enactments. As Justice O'Connor pointed out in her concurrence in *Thompson v. Oklahoma*,[215] legislative enactments that permit a death penalty for a given defendant do not necessarily demonstrate a legislative choice that the defendant in question should die—they instead may indicate that a legislature simply has not considered the question.[216] In fact, the latter is the only reasonable conclusion when one is considering the possible disproportionality of a sentence under a totality of circumstances approach.

The Court has examined legislative enactments to determine if the legislatures, as representatives of the American people, approve or disapprove of the death penalty in question. This examination may be of use when the Court looks to the determinative effect of a single factor but it is totally inappropriate under a totality of circumstances approach. It is probable that the legislatures did intend to include most felony murderers and deliberate murderers among those who are eligible for execution. In some cases, however, such as the 16-year-old, mildly retarded felony murderer, or a mercy killer, it would be absurd to say that a legislature has chosen deliberately to include these defendants among those to be executed. Rather, it would be far more accurate to say that the legislative enactments are simply not relevant to a court's determination of disproportionality because the legislators in all probability did not even consider the death penalty under such circumstances.

In sum, it is clear that there is a compelling need for courts to develop a jurisprudence of effective case-specific disproportionality review not only for a felony murder accomplice but for any capital defendant. As broad as they are, the categorical rules are clearly insufficient to guarantee the quest for proportionality that is at the heart of the Court's entire eighth amendment venture. Perhaps the inadequacy of the bright-line approach was inevitable, but the Court's recent reluctance to create or continue categorical rules has magnified greatly the need for a meaningful alternative.[217]

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[215] 108 S. Ct. 2687 (1988).

[216] *Id.* at 2707 (O'Connor, J., concurring).

[217] Some state courts have used their non-constitutional comparative review procedures to invalidate death penalties in felony murder cases. *See, e.g.*, Lloyd v. State, 524 So. 2d 396 (Fla. 1987); Caruthers v. State, 465 So. 2d 496 (Fla. 1985); Rembert v. State, 445 So. 2d 337 (Fla. 1984); State v. Bensen, 323 N.C. 318, 372 S.E.2d 517 (1988).

VIII. Conclusion

There are two easy ways to resolve the contradictions between the felony murder rule and the dictates of the eighth amendment in capital cases. One would be to abolish the felony murder rule. The other would be to limit it to non-capital cases. The courts and the legislatures have shown no inclination to do either.

The courts, of course, could ignore the contradictions and could allow the execution of even the least culpable felony murder accomplices while many cold-blooded deliberate killers are allowed to live. To do so, however, would contradict the Supreme Court's entire effort to provide some rationality in our choice of who is to die. The Supreme Court's continual return to these cases indicates that the Justices are acutely aware of the problems caused by the persistence of the felony murder rule. This rule alone can take a defendant and place him on death row alongside the most heinous of killers whereas, without the rule, he or she may not even be guilty of any form of homicide.

This article has made two suggestions: first, eliminate the use of felony murder as a narrowing device when the defendant's conviction is predicated on felony murder; and second, conduct case-specific proportionality review in felony murder capital cases. Both suggestions are rooted in the existing eighth amendment jurisprudence, and, if adopted, should help eliminate the problems caused by the continuing vitality of the felony murder rule in the age of eighth amendment capital punishment.

A proper application of the eighth amendment narrowing requirement in felony murder cases, together with the entire edifice of procedural protections required by the Court in capital cases, would minimize the chance that a demonstrably undeserving felony murder defendant would receive the death penalty. History and common sense teach us, however, that some of these defendants inevitably will be sentenced to death.

The statistics cited in *Enmund* are still valid—few felony murderers who did not intend to kill are ever sentenced to death.[218] Yet

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[218] *See* 458 U.S. 782, 794–95 (1982) (discussing rarity of such executions and death sentences). *See also* Note, *supra* note 37, at 102 (discussing statistics on cases between *Enmund* and *Tison*). On jury leniency for accomplices in felony murder cases, see Dressler, *The Jurisprudence of Death by Another: Accessories and Capital Punishment*, 51 U. Colo. L. Rev. 17, 67–72 (1979); Note, *The Constitutionality of Imposing the Death Penalty for Felony Murder*, 15 Hous. L. Rev. 356, 375 (1978).

the question after *Tison* is: for which of these defendants will a death penalty be grossly disproportionate under the eighth amendment? With no bright-line rule in effect, the court can answer this question only by conducting an intense scrutiny of all of the circumstances of the case. The eighth amendment demands no less.

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